

Central Law Journal.

ST. LOUIS, MO., AUGUST 21, 1896.

An Illinois circuit judge has declared unconstitutional and void the State law requiring the national flag to be displayed over every school house. The case came before him in the form of a motion to quash indictments found against certain school trustees and other officials for failing to execute the law. The legislature had made such violation of the law a misdemeanor, and therein, so the court holds, had exceeded its powers. The decision hinged on this point. There was no question of the right of the State to order the flag down on any of its buildings at such times and in such a manner as it saw fit. The effect of this decision, if affirmed, will be to make patriotism, in so far as it consists in flinging the flag to the breeze, optional.

Two recent cases wherein the courts arrive at opposite conclusions suggest the interesting question as to the extent of the liability of a public treasurer. Does the bond ordinarily required of such an official make his liability greater than that imposed by the common law on all fiduciaries? In *State v. Copeland*, 34 S. W. Rep. 427, on a bond with the usual conditions for faithful performance of duty and for paying over the public money as required, etc., it was held by the Supreme Court of Tennessee that the official was not liable for a loss not due to any negligence on his part. There is nothing in such a bond to increase the common law liability. In reaching this conclusion the court is strongly influenced by considerations of public policy, especially by the fear that the better class of men will not accept office when doing so involves the assumption of so great a liability. In *Fairchild v. Hedges*, 44 Pac. Rep. 125, 42 Cent. L. J. 418, the Supreme Court of Washington (one judge dissenting) held that a county treasurer is liable on the undertaking in his bond for money deposited in a bank that fails, though due care was exercised in its selection. While the court thinks this view is in accord with sound public policy, it rests the decision on the terms of the bond. The two main points on which a difference of opinion is to be found in the

authorities are illustrated by these cases. As a matter of fact the difference between the courts, upon the question arises largely out of considerations of public policy.

+ also post p. 189.

An English court has recently held that the proprietor of a house licensed to sell intoxicating liquors is guilty of an offense under the licensing act, if his servant, during his absence and against his orders, sells to a drunken person; since the act of the servant is within the general scope of his employment. *Commissioners, etc. v. Cartman*, 1 Q. B. 655. This view while it is in accord with the weight of authority in this country is repudiated by many respectable courts. The cases in the United States wherein the view of the English court is upheld are *Edgar v. State*, 45 Ark. 356, 1885; *Mogler v. State*, 47 Ark. 110, 1886; *Loeb v. State*, 75 Ga. 258, 1885; *Boatright v. State*, 77 Ga. 717, 1886; *Snider v. State*, 81 Ga. 753, 1888; *McCutchen v. People*, 69 Ill. 601, 1873; *Noecker v. People*, 91 Ill. 494, 1879; *Fahey v. State*, 62 Miss. 402, 1884; *Teasdale v. State* (Miss.), 3 South. Rep. 245, 1887; *State v. Kittelle* (N. C.), 15 S. E. Rep. 103, 1892; *State v. Denoon*, 31 W. Va. 122, 1888. The leading cases opposed to the doctrine are *Barnes v. State*, 19 Conn. 398; *State v. McCance*, 110 Mo. 398; *State v. Weber*, 111 Mo. 204; *Anderson v. State*, 22 Ohio St. 305. The case of *State v. McCance*, *supra*, clearly exposes the fallacy of the argument upon which the doctrine rests. To say that a master should be held criminally responsible for the act of the servant solely upon the ground that the act is within the general scope of his employment, as the English case puts it, seems both harsh and illogical. Though the servant is employed to sell liquor he is not employed to make illegal sales.

NOTES OF RECENT DECISIONS.

SLANDER — MISJOINDER OF PARTIES DEFENDANT—HUSBAND AND WIFE.—That a wife cannot be joined in an action for slanderous words spoken by the husband, that an action cannot be maintained against two persons jointly for uttering and publishing slanderous words, because the words of one are not the words of another, and that though the hus-

band and wife, in fact, speak the same words, they cannot be joined in an action for slander, are propositions of law asserted by the Supreme Court of Rhode Island in *Blake v. Smith*, 34 Atl. Rep. 995. They say it is "clearly error to join the wife of the defendant in an action for words spoken by the husband; for, while the husband is liable at common law for his wife's torts (9 Am. & Eng. Enc. Law, pp. 82, 83, and cases cited in note 8. See note to *Morgan v. Kennedy* [Minn.], 30 Lawy. Rep. Ann. 521-530, 64 N. W. Rep. 912), yet the converse of this proposition is not true. And to allow her to be joined with her husband for a slander uttered and published by him would be to make her liable for his wrong. The declaration is also demurrable in that it charges, in the fifth count, that the slanderous language therein set out was uttered and published by both of the defendants jointly. It is well settled that an action cannot be maintained against two persons jointly for uttering and publishing slanderous words, because the words of one are not the words of another. The act of each constitutes an entire and distinct offense. *Webb v. Cecil*, 9 B. Mon. 198; *Thomas v. Rumsey*, 6 Johns. 32. This action was commenced in 1891, and hence is not affected by subsequent legislation regarding actions by and against married women. See Gen. Laws R. I. ch. 194, § 16; *Penters v. England*, 1 McCord, 14; *Malone v. Stilwell*, 15 App. Prac. 421. Mr. Townshend, in his valuable work on Slander and Libel, section 118, states the law upon this point as follows: "If two or more utter the like words, either simultaneously or separately, it is not a joint publication, but a separate publication by each, for which each must be sued separately, and for which they cannot be sued jointly." See cases cited in note 1. "Within this rule, husband and wife are considered as separate individuals. If husband and wife utter the like words, either simultaneously or separately, they are two publications; a separate publication by each. For the words uttered by the husband he must be sued alone; for the words uttered by the wife the husband and wife must be sued together." See, also, note to *Morgan v. Kennedy*, *supra*, 527; *Roadcap v. Sipe*, 6 Grat. 213; *Baker v. Young*, 44 Ill. 42. "Though the husband and wife speak the

same words," says Starkie (Sland. & L. p. 354), "the plaintiff must bring different actions, and the court will not permit them to be consolidated, for it would be error to join the wife for words spoken by the husband only, and the declaration would be ill, either upon demurrer or on arrest of judgment." *Diecy, Parties* (Truman's Notes) 325. There may be a joint publication by writing, as, for instance, where the libel is signed by both of the defendants, or where the composition of a libelous letter is participated in by two and written by one of them, and afterwards sent by mail to the person to whom it was addressed. *Miller v. Butler*, 6 Cush. 71. In such case an action may be sustained against both, on the ground that it is an entire offense—a joint act. See *Russell v. Webster*, 23 Wkly. Rep. 59; *Harris v. Huntington*, 2 Tyler, 147; *Starkie, Sland. & L.* 354; *Gazynski v. Colburn*, 11 Cush. 10. So a husband and wife may be jointly sued for a libel published by them jointly. See *Catterall v. Kenyon*, 3 Q. B. 310; *Townsh. Sland. & L.* (3d Ed.) § 119.

LIBEL—LIABILITY OF NEWSPAPERS — PRESUMPTION OF MALICE.—The authorities generally, English and American, hold the editor and publisher of a newspaper to the same rigid responsibility with any other person who makes injurious communications. Malice on his part is conclusively inferred if the communications are not true. The Supreme Court of Louisiana so holds in *Fitzpatrick v. Daily State Pub. Co.*, 20 South. Rep. 174. They say also that it is no defense that same have been copied with or without comment from another paper, or that the information upon which an editorial article is based was obtained from the columns of another paper. It is no defense that the source of information was stated at the time of publication, and that the editor or publisher believed it to be true. The freedom of speech and the liberty of the press were designed to secure constitutional immunity for the expression of opinion; but that does not mean unrestrained license, nor does it confer the right upon the editor and proprietor of a newspaper to write or publish whatever he may choose, no matter how false, malicious, or injurious it may be, without full responsibility for the damage it may cause; that the modern rule with regard

to the conditional privilege which newspaper publications enjoy is that when the publication is made in good faith, in the ordinary course of the publisher's business, with good motives and for justifiable ends, and without any intention to work injury to the reputation or character of the subject of it, the party injured will be restricted in his recovery to actual damages; but the publisher is liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also such damages, on account of injured feeling, as must unavoidably be inferred from the publication of such libel; and as the law looks to the *animus* of the publisher in permitting his columns to be employed for the dissemination of calumny, circumstances may be shown in mitigation of damages. The instigating circumstances pointed out by the defendants in the case being that the administration of the government of the city of New Orleans had become so notoriously corrupt that suspicion, in the public mind, rested alike upon all those in any way connected with it, and urgently demanded investigation and reform; that they, as faithful and fearless public journalists, felt in duty bound to direct public attention to this serious condition of affairs; and consequently, when Orlopp, an important city contractor, made the disclosure attributed to him in certain other city papers, they deemed it to be the discharge of a public duty to make upon them the editorial comment that is complained of, it was held that, while conceding the principle, the conclusion is denied, in the total absence of a plea of justification and proof of the truthfulness of the specifications in the article contained; for the law is just as studious to protect the reputation and character as it is the property of the citizen, and the public official from unnecessary, unseemly, and unwarrantable aspersions, upon the management and conduct of his office, through the columns of a newspaper. While it is undoubtedly true, says the court, that the preservation of good and pure government, either in city or State, greatly depends upon a free and fearless expression of public sentiment through the columns of the journals of the country, yet it is equally true that same must and can be accomplished through the instrumentality of cogent, temperate, and well-reasoned edi-

torials, predicated upon facts, and not by means of hasty, intemperate, and opprobrious criticisms and abuse, having no other foundation than the current local items published in some other paper. This rule, if adhered to, will greatly tend to the promotion of truth, good morals, and good government.

CRIMINAL LAW—LASCIVIOUS COHABITATION.
—The Supreme Court of Appeals of West Virginia decides in *State v. Miller*, 24 S. E. Rep. 882, that to constitute the offense of lewd and lascivious cohabitation it must be proved that the parties cohabited together—that is, lived together in the same house as man and wife; proof of occasional acts of illicit intercourse is not sufficient. The court says in part:

Could the defendants be convicted of fornication on this evidence? I think not. If they could, that would not show them guilty of the offense of which they are indicted, for transient acts of intercourse, though they may be items of evidence going, with other circumstances, to show lewd and lascivious cohabitation, do not, by any means, alone establish it. A separate section of the Code from that under which this indictment was found applies to that. The statute says "lewdly and lasciviously associate and cohabit together." Code 1891, ch. 149, § 7. Webster gives the verb "cohabit" two meanings,—one, "to inhabit or reside in company, or in the same place or country." Of course, the sense of the word in our statute is not this sense. Webster's second definition is "to live together as husband and wife." Plainly, this is the meaning of the word in our statute. Black's Law Dictionary, among several meanings, gives, as its first, "to live together as husband and wife." So does Bouvier. That this is the meaning of the word in our statute is apparent from the opinion by Judge Wood in *State v. Foster*, 21 W. Va. 767. And, on literally the same statute, it has been twice held in Virginia that, "to constitute the offense, it is essential that it be proved that the parties cohabit together,—that is, live together in the same house as man and wife. Proof of occasional acts of incontinence merely is not sufficient." *Pruner & Clark's Case*, 82 Va. 115. They must appear and act to the world as man and wife, without being married. The Iowa statute is "lewdly and lasciviously associate and cohabit together." Revision 1860, § 4351. In *State v. Marvin*, 12 Iowa, 499, the parties, just as in this case, lived in the same house as master and servant, and on two occasions, the defendant was seen getting out of bed with the female defendant. The court said: "'Cohabiting' means more than living together in the same house, and 'lewdly and lasciviously' means more than occasional acts of intercourse." In *Searls v. People*, 13 Ill. 597, the court said: "The parties must dwell together openly and notoriously in illicit intimacy, upon terms as if the conjugal relations existed between them. In other words, they must cohabit together. There must be an habitual illicit intercourse between them. The object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in

illicit intimacy, which outrages public decency, having a demoralizing and debasing influence on society." In Massachusetts the statute uses the same words as ours, and such was its construction in *Com. v. Calef*, 10 Mass. 153. So say *Bish. St. Crimes*, § 712; *Whart. Cr. Law*, § 1747. See *Carotti v. State*, 42 Miss. 334.

MASTER AND SERVANT—SERVANT OF ONE MASTER AS THE SPECIAL SERVANT OF ANOTHER.—We published some time ago an article, in which the writer collated the authorities to illustrate the general proposition that the servant of one master may become the special servant of another. See 39 Cent. L. J. p. 341. A recent New Jersey case—*Delaware, L. & W. R. Co. v. Hardy*—recognizes and enforces that doctrine holding, that a general servant of one person may, for a particular work or occasion, become *pro hac vice* the servant of another person, so that the latter will not be liable to him for an injury occasioned by the negligence of other servants engaged with him in a common employment; and that to establish the relation of master to such a servant, it must appear that the servant has, expressly or by implication, consented to the transfer of his services to the new master, and to accept him as his master *pro hac vice*, and has entered upon such service, and submitted himself thereon to the direction and control of the new master. The following is from the opinion of the court:

The "doctrine of collaborateur," as it is sometimes called, is this: A master who would be liable for an injury inflicted by the negligence of one of his servants upon a stranger will not be liable for a like injury inflicted upon another of his servants engaged at the time in a common employment with the negligent servant. To establish the immunity of the master, two things must appear: (1) That the person injured and the person doing the injury were his servants; and (2) that they were both at the time engaged in labor for him, tending to a common purpose, which is to be in a common employment. In a majority of cases the first of these requisites is made out by proof that both the persons injured and the person doing the injury were engaged and employed as servants, were paid for their services, and were directed and controlled therein by one and the same person. Usually the contest is over the other requisites of common employment. But in the class of cases of which that before us is a sample the contest is over the establishment of the relation of service. Doubtless, no man can serve two masters, yet the law clearly recognizes a sort of duality of service. A general servant of one person may, for a particular work or a particular occasion, become *pro hac vice* the servant of another person. What will suffice to prove the assumption of the dual service gives rise to question. I think the applicable rule is admirably expressed by Lord Watson thus: "I can well conceive that the general servant of A might, by working to-

ward a common end, along with the servants of B, and submitting himself to the control and orders of B, become *pro hac vice* B's servant, in such sense as not only to disable him from recovering from B the injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned by his fault to B's own workmen. In order to produce that result the circumstances must be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment." *Johnson v. Lindsay* (1891), App. Cas. 371. To establish the fact that the servant of one has thus transferred his services to another *pro hac vice*, it must appear that he has assented expressly or impliedly to such transfer. No one could transfer the service of his servant to another master without the servant's consent. It must further appear that the servant has in fact entered upon the service, and submitted himself to the direction and control of the new master. His assent may be established by direct proof that he agreed to accept the new master and submit himself to his control, or by indirect proof of circumstances justifying the inference of such assent. Such evidence may be strong enough to justify a court in removing the question from the jury, or it may require to be submitted to the jury. The case of *Ewan v. Lippincott*, *ubi supra*, has, as I conceive, been misunderstood. It falls within the rule above stated. It came to this court upon a rule to show cause. It appeared in the case that Ewan was a machinist employed by D & W, master machinists. Lippincott was a mill owner who employed D & W to alter the gearing of a wheel. D & W sent Ewan to do the work, and he and Lippincott arranged how it was to be done, and particularly that, at times when Ewan was not at work on the wheel, it should be run by Lippincott's engineer to furnish power for the mill. The trial judge charged that, upon this evidence, Ewan and the engineer (whose negligence had injured Ewan) were not the servants of a common master. Obviously, this ruling was erroneous, if the evidence either established, or tended to establish, that they were fellow-servants. In the former case a nonsuit should have been granted. In the latter case the question should have been submitted to the jury. The verdict was set aside, and a new trial granted. The opinion of Mr. Justice Reed clearly indicates that in his view the evidence established the co-service of Ewan and the engineer, and in that opinion I concur. But it is unnecessary to go so far in order to support that case, for there was clear evidence from which a jury might infer that Ewan had assented to the transfer of his services to Lippincott, and submitted thereon to his control. The much-discussed case of *Wiggett v. Fox*, 11 Exch. 832, was cited and relied on by Mr. Justice Reed, and, in my judgment, exhibits the application of the same rule. The jury had found that the injured person was in the employment of a subcontractor, and not of the defendant, who was the general contractor for the building of the Crystal Palace. The reviewing court, having found that the evidence established that the subcontractor and his men (including the plaintiff) had submitted themselves to the control of the general contractor, and accepted him as their master, set the verdict aside and directed a nonsuit. The case was thus explained by Baron Charnell, though Lord Cockburn doubted whether the facts were correctly stated. *Abraham v. Reynolds*, 5 Hurl. & N. 143; *Rourke v. White Moss Colli-*

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ary Co., 2 C. P. Div. 205. Later English cases show the application of the same rule. *Johnson v. Lindsay*, 23 Q. B. Div. 508; *Id.* (1891) App. Cas. 371; *Cameron v. Nystrom* (1893), App. Cas. 308.

DIVORCE — DECREE OF ANOTHER STATE — COLLATERAL ATTACK — CONTRACT FOR SEPARATION.—It is held by the Supreme Court of Indiana in *Hilbisch v. Hattle*, 44 N. E. Rep. 20, that a decree of divorce of a court of general jurisdiction of a foreign State, reciting that defendant was summoned "as the law directs," and that plaintiff was a resident of the county, cannot be collaterally attacked because the affidavit required to precede and authorize publication of notice to defendant, a non-resident, does not appear from the record, or because the petition does not allege plaintiff's residence; that under the Indiana statute declaring that the divorce of one party shall fully dissolve the marriage contract as to both, and that a divorce decreed in another State by a court having jurisdiction thereof shall have full effect in this State, a decree of divorce granted to a man in another State, on constructive notice to the wife, and not attempting any adjudication of the wife's property rights in this State, will have the same effect, as to her rights in his property in Indiana, as if rendered there, and that a contract between a husband and wife in view of separation, whereby, in consideration of a conveyance of a just and fair proportion of his property, she relinquishes all her rights in his property, as wife or widow, not having been rescinded, is binding. Upon the law applicable to the case the court has this to say:

But it is further contended by appellant that, even if the decree of divorce rendered by the circuit court of Daviess county, Mo., should be held valid, still, that court not having acquired jurisdiction over the person or property of appellant, such judgment or decree could not affect any property rights which appellant might have in this State. And section 2660, Rev. St. 1894 (section 2490, Rev. St. 1881), that no act of the husband, without his wife's assent, and no disposition of his property "by virtue of any decree, execution or mortgage to which she shall not be a party except as provided otherwise in this act) shall prejudice or extinguish the right of the wife to her third of his lands, or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto," is cited in support of such contention; citing, also, *Grisson v. Moore*, 106 Ind. 296, 6 N. E. Rep. 629, *Van Fleet, Coll. Attack*, §§ 390, 391, and other authorities there referred to. But appellant was a party to the decree of divorce, although, being served only with constructive notice, no judgment could be rendered against her. However, by sections 1060, 1061, Rev.

St. 1894 (sections 1048, 1049, Rev. St. 1881), it is provided that "the divorce of one party shall fully dissolve the marriage contract as to both," and also that "a divorce decreed in any other State, by a court having jurisdiction thereof, shall have full effect in this State." It would seem, therefore, that appellant, not being the surviving wife of Jacob Hilbisch, could not, according to the statutes of this State, have any rights in his property by virtue of any marriage relation with him during his lifetime. *Fletcher v. Monroe* (at this term), 43 N. E. Rep. 1053. The Missouri court did not attempt any adjudication upon her rights or property in this State. But that court, after jurisdiction duly had, did determine the status of her former husband, Jacob Hilbisch, and did decree a divorce to him, thus severing the marriage bond that united him to appellant. By force of our statutes, above quoted, it would seem that the same consequences followed that would have followed if the decree had been rendered in this State.

But, even if the property rights of the parties were not fixed by the decree of divorce, still we think that the postnuptial contract shown in the special findings would be sufficient to support the conclusions of law in favor of appellee. By that contract the appellant received 100 acres of land, worth \$9,000, as in full of all claims of appellant, present or prospective, upon her husband or his estate, including any inchoate or contingent interest she might have as his surviving wife. This contract was found by the parties at the time to be her fair share of the estate, taking into account all her husband's property and all his debts. She was, in that negotiation and contract, represented by able counsel, and it would seem that all her rights were fully protected. It is the policy of the law that such just and fair provisions for the wife's support shall be respected and carried into effect. In case of a suit for divorce or alimony, the law requires that such provision shall be made for the wife; and when a voluntary agreement is made, either before or after marriage, if it is in all respects fair and adequate in proportion to the husband's property, the contract will be maintained. *Randles v. Randles*, 63 Ind. 93. In *Hollowell v. Simonson*, 21 Ind. 398, it was said: "We understand it to be well settled, upon ample authority, that a relinquishment of dower by the wife, the husband being then alive, is a good and valuable consideration for a conveyance by the husband, or procured by him, to the wife, or property which may be considered but a fair equivalent, and that the same will be viewed as valid, or not, as it may be shown to be fair or fraudulent; and the comparative value of the respective estates and interests may be taken into consideration. 2 Lev. 146; *McCann v. Letcher*, 8 B. Mon. 326; *Ward v. Shallett*, 2 Ves. Sr. 16; *Ath. Mar. Set. 162*." This statement of the law is quoted and approved in *Brown v. Rawlings*, 72 Ind. 505, where it is held that an agreement by a husband to convey certain lands to his wife in consideration that she would relinquish her inchoate interest in his lands, which she did, is valid, even though such agreement is not in writing. And in *Jarboe v. Severin*, 85 Ind. 496, this court said: "The release by a wife of her inchoate interest in her husband's estate may be a valuable consideration. *Hollowell v. Simonson*, 21 Ind. 398; *Brown v. Rawlings*, 72 Ind. 505. In *Farwell v. Johnston*, 34 Mich. 342, it is said: 'It has always been held that a release by a wife of an interest that was within her own option to release or not—as, for example, a right of dower—is a valuable consideration, which will support a postnuptial settlement, and therefore will suffice for any other pur-

pose." See, also, *Copeland v. Copeland*, 89 Ind. 29; *Worley v. Sipe*, 111 Ind. 238, 12 N. E. Rep. 385. In *Dutton v. Dutton*, 30 Ind. 452, Chief Justice Ray speaking for the court, it was said that the following instruction "fairly stated the law and should have been given. That where a parol agreement made between husband and wife in view of separation, and fully executed on the part of the husband, wholly for a consideration which, in the light of all the circumstances of the parties at the time the contract is made is fair, reasonable, and just, the contract will be upheld." That such a contract between husband and wife, when fair to all parties, will be upheld in equity, see *Sims v. Lickets*, 35 Ind. 181, 9 Am. & Eng. Enc. Law, 972, 14 Am. & Eng. Enc. Law, 552, and authorities cited in notes.

ATTORNEY—PRIVILEGE — SERVICE OF SUBPŒNA WHILE ATTENDING COURT.—In *Central Trust Co. v. Milwaukee St. Ry. Co.*, decided by the United States Circuit Court of Wisconsin, it was held that service of subpoena to attend hearings as a witness, upon an attorney who has come from another State to attend to business of his clients pending in the court, before he has had reasonable time to take his departure, will be set aside, on his motion, as a violation of the protection which the law extends to all necessarily attending upon a court, especially when the business of his client requires his immediate presence in other States. The court said:

The facts stated by the petition, and conceded upon the hearing, are substantially as follow: The petitioner is an attorney-at-law residing in New York city, and has been engaged as counsel in the recent Northern Pacific litigation, throughout its pendency in this and other courts. He is also president of the defendant corporation in the above entitled action. On April 28, 1896, he was in attendance before this court on application for certain important decrees respecting the Northern Pacific Railway Company, having come from New York expressly for that purpose. Immediately after the hearing, while he was engaged in such matters, and in the office of the clerk of this court, the petitioner was served with a subpoena requiring his attendance as a witness before a commissioner of this court on May 1, 1896, in an examination pending in the above entitled action, on behalf of an intervener therein—being a matter entirely outside of said engagement. His duty as counsel in the Northern Pacific proceedings required his departure the same evening for St. Paul, and thence to various distant points, to obtain entry of ancillary decrees carrying out the purposes of the decrees entered here. Upon these facts, is a case presented which calls for intervention by the court to save the petitioner from compulsory attendance herein as a witness on behalf of adverse parties, taking into consideration the fact that he is the president of the defendant, a Wisconsin corporation, and a non-resident of the State? The answer to this inquiry is clearly deducible from the authorities.

The ancient rule in England extended to practicing attorneys generally the privilege from arrest by the ordinary process of court, on the theory that they

were "always supposed to be there attending," and that the "business of the court or their client's cause would suffer by their being drawn into any other than that in which their personal attendance is required." 3 Bl. Comm. 289; Bac. Abr. tit. "Privilege." The doctrine obtained no acceptance, as an entirety, in the jurisprudence of this country; and a privilege of such nature and extent could not well exist in the light of American institutions, nor under the conditions of the present day. But, out of the common law rule, it has become firmly established in the courts of the Union that "all persons who have any relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process, are, for the sake of public justice, protected from arrest in coming to, attending upon and returning from the court" (Tidd, Prac. 196; 1 Greenl. Ev., §§ 316-318, and cases cited)." *In re Healey*, 53 Vt. 694, 38 Am. Rep. 714, and notes, page 717. Necessarily, if not primarily, the immunity extends to the attorney representing the cause of his client before the court. In that view, it is stated in *Brooks v. Patterson*, 2 Johns. Cas. 161: "The object is that attorneys may not be drawn into other courts, or to other business, to the injury of the suitors," but that "the privilege is that of the court, for the sake of public justice, and is not intended as an accommodation to the individual." And in the leading case of *Parker v. Hotchkiss*, 1 Wall. Jr. 200, Fed. Cas. No. 10,739, it is said, in the opinion by Judge Kane, in which Chief Justice Taney and Mr. Justice Grier concurred, that the privilege is that of the court, and the immunity of the parties is incidents; that it arises "in the necessities of the judicial administration, which could be often embarrassed, and sometimes interrupted," if suitors and officers were not thus protected; and with reference to its exercise being discretionary, "as the purpose of substantial justice may require" (per Starrett Case, 1 Dall. 357), the explanation is given that "the suitor or the witness from another jurisdiction may be relieved; he who is at home here amongst us, suffering no inconvenience from the service, may be refused a discharge." The opinion further commends *Halsey v. Stewart*, 4 N. J. Law, 420, as containing clear exposition of the law, and in that case the court says: "Courts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them;" that "he should also be enabled to procure without difficulty the attendance of all such persons as are necessary to manifest his rights." No decision has been called to my attention which denies the protection to the attorney in actual attendance, nor to a non-resident for sufficient further time to come to and return from such attendance, and the right is clearly declared in the cases above cited, and in *Com. v. Ronald*, 4 Call. 97; *Secor v. Bell*, 12 Johns. 52; *Humphrey v. Cumming*, 5 Wend. 90; *Case of McNeill*, 3 Mass. 287; *Anderson v. Rountree*, 1 Pa. 115. And in *Parker v. Hotchkiss*, *supra*, an instance is cited, with approval, in which Judge Sharswood, of the Pennsylvania Supreme Court, set aside the service of a summons upon an attorney from another county attending as counsel in a cause there pending. Upon the question whether the rule applies to the service of a subpoena, or other civil process, where there is no arrest, in the literal sense, the authorities in the State courts appear to preponderate in so holding, although there are decisions otherwise, as per *Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. Rep. 22. But the doctrine of the federal courts clearly is

tends the privilege, in favor of non-residents, at least, to all civil process; and in *Miner v. Markham*, 26 Fed. Rep. 387, Judge Dyer pronounced that view for this court, in an opinion which reviews the cases, and states satisfactory grounds for the ruling. See, also, *Hurst's Case*, 4 Dall. 387, Fed. Cas. No. 6,924; *Parker v. Hotchkiss*, *supra*; *Bridges v. Sheldon*, 7 Fed. Rep. 36, 44. The opportunity for serving the subpoena upon the petitioner in the case at bar came only through his call to attend this court upon an important hearing affecting the interest of his clients. If the service is valid, it could compel his attendance here at a time which would seriously interfere with the further attention which he owes to these clients in other courts along the line of the Northern Pacific Railroad. To so hold would violate the principles which aim to protect all having business before the courts. It is unnecessary to place the decision upon the ground that service was made within the constructive presence of the court, as per *Blight v. Fisher*, Pet. C. C. 41, Fed. Cas. No. 1,542, but the fact is sufficient that it was made before there was reasonable time for the return or departure of the petitioner.

THE LEGAL EFFECT OF A PROMISE TO PAY A SPECIFIC KIND OF MONEY.

Since people are not disposed to enter into engagements which confer a doubtful advantage on the one side, and impose an indeterminate burden on the other, any cause which has a tendency to produce variations in the real value, considered as the representative of wealth, of the medium of payment for money contracts, has also a tendency to render difficult the making of such contracts, and hence to obstruct the normal and necessary processes of commercial and industrial life. Where the law invests distinct kinds of money with the attribute of satisfying debts, and these several species of money are believed, for any reason, to be subject in unequal degrees to variations of real value, there is always a tendency on the part of persons making money contracts to stipulate for payment in that kind of money which is believed to be most stable in value. As contracts for payment of specific kinds of money are now very common, it is a matter of practical importance to determine the legal effect of such contracts.

It may be premised that a promise to deliver a definite weight and quality of the precious metals does not differ in legal incidents from a promise to deliver a definite weight and quality of any other commodity. Upon default, the injured party is entitled to a general money judgment for such a

sum as is equivalent to the market value of the stipulated weight and quality of the metal in question at the time and place of delivery. Hence, where the yearly rent reserved in a lease was "four ounces, two pennyweights, and twelve grains of pure gold," equivalent when the lease was made to \$80 per annum, and at the time the rent fell due to \$90 per annum, judgment will be entered for the latter sum.¹ Where there is a promise to deliver specific coins, capable of identification, as distinguished from specific kinds of coins, and it appears that the coins mentioned in the contract possess a peculiar and unique value to the promisee, equity will intervene to compel the delivery of the identical coins agreed to be delivered.²

An obligation to pay a specified sum of money designated simply in terms of monetary units of the United States can be enforced only by a general money judgment, which can be satisfied by payment in any variety of money declared by law to be a legal tender for private debts.³ A contract to pay a sum of money stated in the denominations of a foreign currency, if sued upon in the United States, entitles the plaintiff to a judgment in terms of United States money.⁴ The sum stated in foreign money will be reduced to its equivalent, computed on the basis of the real par of exchange, in that variety of legal tender United States money which is most depreciated in value, since it can be assumed that the debtor will satisfy the judgment in such money, and the creditor cannot, without the debtor's consent, compel him to pay in any other.⁵ Where a contract contains a promise to pay a specified number of dollars, it may be inferred from the circumstances attending the execution of the contract that the parties meant by the word "dollars" a particular kind of dollars, as,

¹ *Dewing v. Sears*, 11 Wall. 379.

² *Duke of Somerset v. Cookson*, 3 P. Wms. 389; *McGowin v. Remington*, 12 Pa. St. 56.

³ *Knox v. Lee*, 12 Wall. 457; *Legal Tender Cases*, 110 U. S. 421; *Woodruff v. Mississippi*, 162 U. S. 293; *Swain v. Smith*, 65 N. C. 211; *Verges v. Decker*, 28 Mo. 459; *George v. Concord*, 45 N. H. 434; *Murray v. Harrison*, 47 Barb. (N. Y.) 484.

⁴ *Butler v. Horwitz*, 7 Wall. 258; *Christ Church Hospital v. Tuechall*, 54 Pa. St. 71; *Harrington v. McMorris*, 5 Taunt. 228; *Ehrensperger v. Anderson*, 3 Exch. 148.

⁵ *Sears v. Dewing*, 14 Allen, 413; *The Vaughan & Telegraph*, 14 Wall. 258; *Gibson v. Grover*, 63 N. C. 10.

for example, "Confederate dollars."⁶ It cannot, however, be inferred that the word "dollars," employed in a bond, means "gold dollars," simply because a different interpretation would give the obligee a palpably inadequate consideration for property sold.⁷

Where the contract requires the payment of a specific kind of money, several distinctions arise which it is necessary to keep in mind in order to determine the rights and obligations of the parties. If the contract is for payment of a particular kind of money which is a legal tender, as, for example, a specified sum in "gold coin," many States hold that such contracts can be discharged by payment of any legal tender money of the same nominal amount.⁸ And it has been held in Missouri that where the contract provides for payment "in the current gold coin of the United States in full tale or count, without regard to any legal tender that may be established or declared by any law of congress," that nevertheless, the tender of United States treasury notes is a good tender.⁹ On the other hand it is decided in other States that a promise to pay in a particular kind of legal tender money, will entitle the promisee to a judgment payable in the money specified in the contract, and that such judgment can be satisfied only by payment in that specific kind of money.¹⁰ The conflict of doctrine prevailing in the State courts as to the legal effect of promises to pay in specific kinds of money has been rendered unimportant by the intervention of the federal courts. The Supreme Court of the United States has decided, that where a party sets up in a State court that he is en-

titled to have the bond in suit satisfied in "gold and silver coin, lawful money of the United States," and the State court of last resort denies him such right, and adjudges that the bond is solvable in United States notes, that such judgment is a denial of a right, privilege, and immunity claimed under the constitution and statutes of the United States, and that such party is entitled to an appeal to the Supreme Court of the United States, under the 25th section of the judiciary act of 1789, as amended in 1867.¹¹ This doctrine has been several times reaffirmed, and is now well established.¹² Under these decisions we must look to the federal courts for the controlling rule with respect to the obligations and rights arising from contracts to pay particular kinds of money. The federal rule is, that a promise to pay a particular kind of legal tender money will entitle the promisee to exact payment in that specific kind of money.¹³ An obligation to pay a stated sum in "gold coin" will require a judgment payable in gold dollars of the coinage of the United States.¹⁴ One payable "in specie" requires a judgment payable in "gold or silver dollars."¹⁵ When, however, the agreement was for "gold or its equivalent" it was held solvable in any kind of money which is a legal tender.¹⁶

While a contract to pay a particular kind of legal tender money can, under these decisions, be enforced by a judgment for the agreed kind, we have still to consider the effect of contracts to pay in specific currency which is not a legal tender. The difficulty in resolving this case grows out of the technical rule, that a money judgment must be payable, either generally in lawful (i. e., legal tender) money of the United States, or specifically, in a particular kind of legal tender money.¹⁷ A judgment for something not lawful money would be in the nature of a decree for specific performance and

⁶ The Confederate Note Case, 19 Wall. 548; The Wilmington R. R. Co. v. King, 91 U. S. 3; Rives v. Duke, 105 U. S. 132; Effinger v. Kenney, 115 U. S. 566.

⁷ Maryland v. Railway Company, 22 Wall. 105.

⁸ Henderson v. McPike, 35 Mo. 255; Appel v. Woltman, 38 Mo. 194; Riley v. Sharp, 1 Bush (Ky.), 348; Laughlin v. Harvey, 52 Pa. St. 9; Brown v. Welch, 26 Ind. 116; Buchegger v. Schultz, 13 Mich. 420; Mervine v. Sailer, 5 Phila. 422; Bank v. Burton, 27 Ind. 426; Frothingham v. Morse, 45 N. H. 545; Wilson v. Morgan, 30 How. Pr. (N. Y.) 386; Gallions v. Pierre, 18 La. Ann. 10.

⁹ Appel v. Woltman, 38 Mo. 194.

¹⁰ Carpenter v. Atherton, 25 Cal. 569; Wells, Fargo & Co. v. Van Sickle, 6 Nev. 50; Chesapeake Bank v. Swain, 29 Md. 483; Independent Ins. Co. v. Thomas, 104 Mass. 192; Kellogg v. Sweeney, 46 N. Y. 291; Hittson v. Davenport, 4 Colo. 169; Myers v. Kauffman, 37 Ga. 600; Chrysler v. Renois, 43 N. Y. 209; McGoon v. Shirk, 54 Ill. 408; Webb v. Moore, 4 T. B. Mon. 483.

¹¹ Bronson v. Rodes, 7 Wall. 229.

¹² Trebilcock v. Wilson, 12 Wall. 687; Butler v. Horwitz, 7 Wall. 258; Bronson v. Kimpton, 8 Wall. 441; Woodruff v. Miss., 162 U. S. 293.

¹³ Bronson v. Rodes, 7 Wall. 229; Trebilcock v. Wilson, 12 Wall. 687; Cheang Kee v. United States, 3 Wall. 320; Butler v. Horwitz, 7 Wall. 258.

¹⁴ Bronson v. Rodes, 7 Wall. 229.

¹⁵ Trebilcock v. Wilson, 12 Wall. 687.

¹⁶ Jones v. Smith, 48 Barb. 552; Atkinson v. Lanier, 69 Ga. 460; Reese v. Stearns, 29 Cal. 273.

¹⁷ Black on Judgments, Secs. 151, 152, and cases cited.

not a money judgment. Rigid logic would seem to require that the particular currency designated in the contract be treated as a commodity, and reduced, on the basis of exchange value, to terms of legal tender money. But this cannot be confidently asserted to be the law, as the tribunal of final resort upon the question, the Supreme Court of the United States, has not as yet decided it. It has been adjudged by a State court that a promise to pay a stated sum "in current bank notes of the city of Cincinnati" entitles the promisee, upon default, to a general money judgment for the same nominal sum with interest.¹⁵

The foregoing doctrines as established by the courts are now menaced by a considerable body of public opinion which demands that congress enact "such legislation as will prevent for the future the demonetization of any kind of legal tender money by private contract," which declaration appears to mean, that congress prohibit by law the making of contracts payable in specific kinds of money. If such federal legislation is enacted it will become a matter of practical importance to determine whether congress has power under the constitution to limit the right of private contract in that respect. This, of course, is too grave a constitutional question to admit of discussion within the limits of the present article, but is referred to simply as a contingency having some relation to the questions herein considered.

WALTER D. COLES.

St. Louis, Mo.

¹⁵ Morris v. Edwards, 1 Ohio, 80.

ELECTIONS AND VOTERS—RIVAL CONVENTIONS OF ONE POLITICAL PARTY—SECRETARY OF STATE—DUTIES AS TO CANDIDATES NOMINATED.

PHELPS v. PIPER.

Supreme Court of Nebraska, June 2, 1896.

1. The secretary of State will not decide which of two rival conventions of the same political organization is the regular one.

2. Where such rival conventions nominate candidates and certify such nominations in due form, the secretary of State must certify such nominations to the several county clerks, and not assume to inquire into the regularity of the respective conventions.

3. The question as to which faction is the true representative of the party organization is rather political than judicial.

RAGAN, C.: This action concerns the duty of the secretary of State in certifying nominations for State offices under the provisions of *Sess. Laws 1891, ch. 24*, commonly known as the "Australian Ballot Law." It was presented shortly before the last general election, and its exigencies required an immediate decision, which was then rendered. Subsequently the parties withdrew the record for the purpose of making certain formal amendments to the pleadings, so that the preparation of an opinion has been necessarily delayed. Notwithstanding the manner in which the parties have entitled the case, it is essentially an application for a writ of *mandamus*. Only when so viewed can it present a case within the original jurisdiction of this court. It has been so treated by the court, and we shall refer, therefore, to Phelps as the relator and to the secretary of State as the respondent.

The relator alleges that he is an elector of the State of Nebraska, and the nominee of the Democratic party for the office of judge of the supreme court, to be voted for at the general election to be held on the 5th day of November, 1895, and that he brings this action in his own behalf, in behalf of the Democratic party, and in behalf of all the electors of the said party; that under the rules and according to the usages of the Democratic party of the State of Nebraska a committee called the "Democratic State Central Committee" duly authorized by the Democratic party of said State, did call a convention of the Democratic party of said State to meet in Omaha on the 26th day of September, 1894, composed of 556 delegates, duly elected by the Democratic party of the State; that said convention was duly organized by the election of W. D. Oldham as chairman and Dan B. Honin as secretary; that among the duties which, under the rules and customs of said party, devolved upon said convention, was that of electing a new State central committee; that said convention, under the rules and customs governing said party, did select a State central committee to serve for the term of two years, and selected a chairman thereof to serve for a like period; that under the rules and customs governing said party said committee so elected was charged with the duty of representing and acting for the Democratic party of the State at all times during said two years except when a duly-authorized convention was in session; that said committee is the only body under the rules and customs of the party having authority to call a convention, and the only body which has authority, when the convention is not in session, to act for the party in any way; that said committee, in accordance with the rules and usages of the party, called a convention to meet in Omaha on the 22d day of August, 1895, for the purpose of nominating a candidate for the office of judge of the supreme court and for the purpose of nominating two candidates for the office of regents of the university; that said convention, consisting of duly-authorized representatives of the party,

did meet in Omaha on the 22d day of August, 1895, and did, according to the laws and usages of the Democratic party, nominate the relator as the candidate of the party for the office of judge of the supreme court, and nominated Alfred T. Blackburn and Robert Kittle as the candidates of the party for regents of the university; that said nominations were duly certified to and filed with the secretary of State on the 5th day of September, 1895, and that no objection to said certificate was filed within the three days provided by law; that said convention was the only body having authority to nominate for the Democratic party such candidates; that on the 5th day of September, 1895, a body assembled in Lincoln, "which claimed to represent the Democratic party, but which acted without any authority from said party, or without any right whatever to speak for said party under the rules and usages governing said party in said State of Nebraska," and nominated T. J. Mahoney as candidate for judge of the supreme court, and John H. Ames and W. S. Ashby as candidates for regents of the university; that R. S. Bibb was chairman of said convention and H. B. Hubner was secretary thereof; that said Bibb as chairman, and Hubner as secretary, did, on the 17th day of September, 1895, file in the office of the secretary of State a certificate in which they falsely and fraudulently stated that said Bibb was the chairman of the convention representing the Democratic party, and that said Hubner was secretary thereof, and that a convention representing said party did nominate said Mahoney, Ames and Ashby, as aforesaid. The relator further states that each of the said allegations in said certificate is entirely false, and made for the purpose of deceiving the voters of the State; that, unless restrained, the respondent will certify to the clerk of each county the names of Mahoney, Ames and Ashby as candidates of the Democratic party for said respective offices to be placed upon the official ballot to be voted at the next general election; "that said convention which met in Lincoln on the 5th day of September, 1895, selected a State central committee of thirty-three members; that said committee afterwards met and duly organized by the election of Euclid Martin as chairman thereof and J. B. Sheean as secretary thereof, and that said committee claims to be the Democratic State central committee of Nebraska. Plaintiff further says that the candidates and supporters of the ticket headed by Charles J. Phelps and the candidates and supporters of the ticket headed by Timothy J. Mahoney all agree that there is but one Democratic party in Nebraska, but disagree as to which of the said tickets represents said Democratic party; the plaintiff and his supporters contending that the said ticket headed by said Charles J. Phelps represents the Democratic party of the said State, and defendant and his supporters contending that the said ticket headed by Timothy J. Mahoney represents the said Democratic party." The prayer is, in brief, for

an order commanding respondent to omit from his certificate to the clerk of each county the description of Mahoney as a candidate of the Democratic party for judge of the supreme court, and Ames and Ashby as candidates of said party for regents of the university; and for an order commanding the respondent to make his certificate without employing the word "Democrat" or "Democratic" in describing the political party or principles of said Mahoney, Ames and Ashby.

The respondent, by his answer, challenges the jurisdiction of the court, and admits that plaintiff is the nominee of a convention claiming to represent the Democratic party. He then alleges at considerable length, in substance, that the Democratic party is a national organization of persons entertaining the same general political views; and that the different State organizations are merely branches of the national organization, for purposes of convenience, and for the purpose of maintaining the political doctrines of the national party; that membership in the party is dependent on allegiance to the political doctrines of the national party; that according to the rules and usages of the party the national convention, which meets once in four years, is the only body having authority to declare the party's doctrines, and that no State organization which does not accept the doctrine so declared by the national convention is or can be the Democratic party of the State; that when any State or other political division is without an organization professing allegiance to and teaching the doctrines of the Democratic party as declared at its last national convention, any body of voters who approve the political doctrines of the party have the right to organize committees and conventions for the maintenance thereof, and committees and conventions so organized are, according to the rules and usages, the Democratic party of such State; that a convention claiming to be the Democratic convention of the State assembled in Omaha, September 26, 1894, but said convention was dominated by another organization known as the "Free Silver League," and under such domination said convention expressly refused to approve or sanction the political doctrines of the Democratic party, but affirmed antagonistic doctrines, and repudiated the doctrines of the party as declared by the last national convention; and that thereupon the Democratic State central committee selected in 1892 called together a convention of voters approving the doctrines of the Democratic party, and that said convention nominated candidates to be voted for at the general election held in 1894, and selected a State central committee; that on June 27, 1895, said committee called a convention of all voters who approved the doctrines of the Democratic party, to be held in the city of Lincoln on the 5th day of September, 1895; that pursuant to said call the several counties selected delegates, who assembled in convention in Lincoln on the day named, and nominated Mahoney, Ames and Ashby for judge

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of the supreme court and regents of the university; that said convention and committee has been recognized by the national Democratic party as the only Democratic convention and committee of Nebraska. The answer then pleads that the officers of said convention in due form certified such nomination to the secretary of State, and that no objections to such certificate were filed within the time provided by law.

It has been necessary to set forth at considerable length the pleadings in order to disclose the real question presented for decision. It will be perceived that both the petition and answer disclose that in 1895 two conventions assembled, each by virtue of a call issuing from a body claiming to be the Democratic State central committee, and each convention claiming to represent the Democratic party of the State. Nominations were made by each convention for the State offices to be filled at the ensuing election, and these nominations were by the officers of each convention duly certified to the secretary of State. No objections were filed to either certificate within the time provided by law, and the secretary of State was therefore about to certify, to the several county clerks, the candidates named on each certificate as those of the Democratic party. The relator, by this proceeding, seeks to prevent the certification of the candidates of the Lincoln convention as Democratic candidates. If the action of the secretary of State can be controlled by the court in this manner, it must be because it is his duty in such a case to determine, as between two bodies or factions, each claiming to represent a political party entitled to have its candidates' names placed upon the ballots, which of such bodies or factions, according to the rules and customs of such party, rightfully represents it; and, further, that when the secretary fails to so adjudicate such question the court shall determine it, and issue its mandate to the secretary of State accordingly. To our minds, neither proposition is tenable. Indeed, we think that the case of *State v. Allen*, 43 Neb. 651, 62 N. W. Rep. 35, is conclusive on the first question at least. It was there held that it is not the province of the secretary of State to determine which of two rival State conventions of the same party is entitled to recognition as the regular convention; and, further, that where two factions of a political party nominate candidates, and certify such nominations to the secretary of State in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts in case of doubt to adopt that construction which affords the citizen the greater liberty in casting his ballot. In the case cited candidates, representing the same faction as that represented by the candidates which we will here for brevity designate the "Mahoney Ticket," applied for a *mandamus* to compel the secretary of State to cer-

tify their names as the candidates of the Democratic party, the secretary having refused to do so. The court denied the writ, holding as we have already stated, and, further, that, the record not disclosing that the relators had been nominated by any convention whatever, the secretary of State could not be required to certify the nominations, because it is his duty to determine in the case of a certificate filed with him whether such candidates were in fact nominated by a convention or assemblage of voters or delegates claiming to represent the party; that is, he should satisfy himself of the genuineness of the certificate. But he has no authority, where a convention in good faith claiming to represent the party has in fact certified its nominations to him in due form, to refuse to recertify the same to the county clerks. We entertain no doubt of the correctness of the principles announced in that case, and it follows that the court by a writ of *mandamus* cannot compel the secretary of State to perform an act which he has no legal authority to perform. If it was the duty of the secretary to certify both sets of nominations, and if he had no power to determine, between the rival factions, which faction represented the Democratic party, then it seems perfectly clear that the court can neither require him to make such decision, nor can the court itself determine which faction rightfully represents the party, and upon such determination require the secretary to omit from his certificates one set of candidates, which *State v. Allen* declares it is his duty to include in the certificate. The legislature has not provided any means for determining such controversies. Political parties are voluntary associations for political purposes. They establish their own rules. They are governed by their own usages. Voters may form them, reorganize them, and dissolve them at their will. The voters ultimately must determine every such question. The voters constituting a party are, indeed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom of elections, the liberty of voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, or doctrines of political parties, and to exclude from the official ballots the names of candidates placed in nomination by an organization which a portion, or perhaps a large majority, of the voters professing allegiance to the particular party believe to be the representatives of its political doctrines and its party government. We doubt even whether the legislature has power to confer upon the courts any such authority. It is certain, however, that the legislature has not undertaken to confer it. We shall not enlarge upon the views we have expressed. If authority were needed in their support, we think the underlying principles suggested are those which governed

the courts in *People v. District Court*, 18 Colo. 26, 31 Pac. Rep. 339; *Shields v. Jacob*, 88 Mich. 164, 50 N. W. Rep. 105, as well as in *State v. Allen*, *supra*. Writ denied.

NOTE.—The decision of the principal case is in line with the authorities which are not very numerous. As a general proposition, judicial tribunals will not assume to decide which of two rival factions of a political organization represents the party. Of course, the ordinary rules of justice and fairness in the conduct of political caucuses and conventions will be enforced by the courts. *In re Woodworth*, 16 N. Y. Sup. 147. See *Appointment of Supervisors of Elections*, 9 Fed. Rep. 14. Where the minority faction of a political party secedes, and organizes separately, the decision of the majority faction that certain persons were duly elected members at a caucus of the party is not conclusive, but the question is reviewable by the courts. *In re Broat*, 27 N. Y. Sup. 176. But the determination by the State convention of a party, on a contest between two delegations, as to the regularity of the convention by which they were nominated, will be treated by the courts as conclusive (*In re Redmond*, 25 N. Y. Sup. 381), notwithstanding it may be adverse to a previous judicial determination of the same question. *In re Pollard*, 25 N. Y. Sup. 385. In *People v. District Court*, 18 Colo. 26, 31 Pac. Rep. 339, it was held that where two sets of nominations, both by conventions purporting to have been held by the same political party, and each in apparent conformity with the law, are certified to the secretary of State, he has no power to decide between them, but should certify both tickets to the county clerks in order that both may be printed in the official ballots. It is not the province of either executive or judicial officers to give official sanction to the mere course, regularity or genuineness of any political organization as such. "By pursuing this course, the merits of the opposing candidates will be submitted to the people—the tribunal under our system of government that must ultimately pass upon such questions. The conclusion that the secretary of State should under the circumstances certify both sets of nominations to the county clerks to be printed upon the official ballots, is in harmony with the rule of construction which requires the courts in cases of doubt between two constructions to follow that which will afford the citizen the greatest liberty in casting his ballot." This view is sustained by other Colorado decisions. *Kellogg v. Hickman*, 12 Colo. 256; *Allen v. Glynn*, 17 Colo. 338. The court thought that light weight should be attached to the argument that the voters may be deceived by having two tickets of the same party before the people.

In determining a similar question, the Supreme Court of Michigan, in *Shields v. Jacob*, 88 Mich. 164, 50 N. W. Rep. 105, said: "We do not consider that it is the province of the board of election commissioners to determine which convention represented the regular nominating convention of the party, but that it is the duty of said board to print and place upon the ballot the names of the candidates certified to them by the committee of either branch of the party represented by the two conventions held to nominate city officers, and that the names so certified to them in each list shall be embraced in the ticket so printed, and that it is their duty further, if the same name of a party shall be certified by each of two committees, that the name so certified shall be printed without further addition or distinctive designation than such

as is contained in the certificates furnished." Where the circumstances are as above stated, and the secretary of State or board of election commissioners refuse to place upon the ballots the nominations of the rival conventions, *mandamus* will lie. *People v. District Court*, 18 Colo. 26; *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156; *Stockman v. Brooks*, 17 Colo. 248; *Shields v. Jacob*, 88 Mich. 164.

EUGENE MCQUILLIN.

BOOKS RECEIVED.

Handbook of the Law of Damages. By William E. Hale, LL.B., Author of "Bailments and Carriers." St. Paul, Minn.: West Publishing Co. 1896.

The Law of Charitable Uses, Trusts and Donations in New York. By Robert Ludlow Fowler, Counsellor at Law. New York: The Drossy Law Book Company, Publishers. 1896.

A Preliminary Treatise on Evidence at the Common Law, Part I. Development of Trial by Jury. By James Bradley Thayer, Weld Professor of Law at Harvard University. Boston: Little, Brown & Company. 1896.

A Treatise on the Law of Real Property, as Applied Between Vendor and Purchaser, in Modern Conveyancing or Estates in Fee, and Their Transfer by Deed. By Leonard A. Jones, A.B., LL.B. (Harvard), Author of Legal Treatises. In Two Volumes. Boston and New York: Houghton, Mifflin & Company; The Riverside Press, Cambridge. 1896.

American Electrical Cases (cited Am. Elect. Cas.), being a Collection of all the Important Cases (Excepting Patent Cases) Decided in the State and Federal Courts of the United States from 1873, on Subjects Relating to the Telegraph, the Telephone, Electric Light and Power, Electric Railway and all Other Practical Uses of Electricity, with Annotations, Edited by William W. Morrill, Author of "Competency and Privilege of Witnesses," "City Negligence," Etc. Volume V. 1894-1895. Albany, N. Y.: Matthew Bender, Law Publisher, 511-513 Broadway. 1896.

HUMORS OF THE LAW.

His Honor—Prisoner, you are charged with sending threatening letters through the mail.

Counsel—Your Honor, we admit the letters, but the intent must govern. I shall prove that my client is a professional puglist.—*Puck*.

An honest old blacksmith down in Texas, despairing of ever getting cash out of a delinquent debtor, agreed to take his note for the amount due. The debtor wished to go to a lawyer and have the document drawn up, but the knight of the anvil, who had been a sheriff in days gone by, felt fully competent to draw it up himself. This he proceeded to do with the following result:

"On the first day of June I promise to pay Jesus Nite the sum of eleven dollars, and if said note be not paid on the date aforesaid, then this instrument is to be null and void and of no effect. Witness my hand, etc."

"What a murderous looking villian the prisoner is!" whispered an old lady in the court room to her husband. "I'd be afraid to get near him."

"Hush!" warned her husband; "that, isn't the prisoner; he hasn't been brought in yet."

"It isn't? Who is it, then?"

"It's the Judge."

In attempting to show the light-headedness of a rather silly-looking boy, Curran once interrupted:

"Who made you?"

"Moses," was the unexpected but to Curran highly satisfactory reply, and he at once moved that the witness be declared incompetent. The boy turned to the Judge and meekly asked if he might question the gentleman.

"Certainly," returned the Judge, with a smile.

"Well, who made you?" propounded the lad.

"Aaron," said Curran, amused.

A young lawyer named Hovey was at one time located at Independence, Mo. He went to the house of a friend one day to make a call. An old colored woman appeared at the door, of whom he asked if her master and mistress were at home. On being told they were absent, he said: "Tell your master and mistress that J. Hovey, attorney-at-law, called to see them." The old servant looked at him with amazement, as if unable to believe her own eyes. That evening she exclaimed: "Missus, what do you think! *Jehovah the Eternal Lord*, was here to see you to-day."—*Green Bag*.

WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACTION OF TORT—Venue.—Under Code, § 27, providing that actions other than those relating to real property, or to recover a penalty or forfeiture, shall be tried in the county where the defendant resides, or in the county where plaintiff resides if service is had on defendant in such county, but that actions for tort may be tried in the county where the tort was committed, an action against a railway company for injuries to stock in the course of shipment may be tried in any one of the three counties mentioned.—*DENVER & R. G. R. Co. v. CAHILL*, Colo., 45 Pac. Rep. 285.

2. ADVERSE POSSESSION—Extent.—Where one purchases land inclosed by a fence, and claims title to all within the inclosure, his possession is adverse as to the entire tract, though he believes he is only claiming to the extent of his deed, which in fact does not embrace all the land so fenced.—*BISSE v. CASPER*, Tex., 36 S. W. Rep. 345.

3. APPEAL—Bill of Exceptions.—A bill of exceptions containing statements of the introduction in evidence of certain tax receipts, which does not set out the receipts, but refers to the page in the transcript where they could be found, is insufficient, where it appears that at the page indicated a mere abstract of the various receipts is inserted, and not copies of the receipts.—*SESTON v. TETHER*, Ind., 44 N. E. Rep. 804.

4. APPEAL—Joint Assignment of Error.—An assignment of error that "appellants separately aver there is error," etc., setting out three alleged errors, is a joint assignment as to the parties, and, as such, is good as to none of them unless good as to all.—*SIBERT v. COPELAND*, Ind., 44 N. E. Rep. 305.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A conveyance by an insolvent debtor of all his property to a trustee, to sell it, and apply the proceeds to the payment of certain debts described in the instrument, and providing for the return of the surplus, if any, to the grantor, is not an assignment for the benefit of creditors, but is a mortgage.—*WILLIS v. HOLLAND*, Tex., 35 S. W. Rep. 330.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Interest of Assignee.—The assignee of an insolvent firm under a voluntary assignment represents only his assignors and their creditors, and cannot maintain a bill to reach individual assets of a former member of the partnership, alleged to have been fraudulently conveyed by such member after his colorable withdrawal from the firm, for the purpose of hindering and delaying creditors of the former partnership and of the grantor; such creditors not being parties to the suit, and there being nothing to show that the assignee is authorized to act for them.—*MICHIGAN TRUST CO. v. WEBBER*, Mich., 67 N. W. Rep. 811.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Mortgage.—An instrument conveying property in trust for the payment of debts, and expressly providing that the balance of the proceeds of the property remaining after payment of the debts shall be returned to the grantor, is a mortgage, and not an assignment for creditors.—*ADOUÉ v. COLLINS*, Tex., 36 S. W. Rep. 507.

8. ATTORNEY AND CLIENT—Satisfaction of Judgment.—An attorney at law has no authority, by virtue of his general employment as an attorney, and without special authority from his principal, to assign a judgment belonging to such principal.—*MAYER v. SPARKS*, Kan., 45 Pac. Rep. 249.

9. ATTORNEY'S FEE.—Lien.—In proceedings by a guardian for removal of funds of his ward to a foreign State, a lien on the funds for his attorney's fees incurred in the proceeding cannot be declared in favor of the attorney.—*MANSON v. STACKER*, Tenn., 36 S. W. Rep. 188.

10. CARRIERS OF GOODS—Interstate Commerce Commission—Fixing Rates.—The interstate commerce commission has no power, express or implied, to fix maximum rates.—*INTERSTATE COMMERCE COMMISSION v. NORTHEASTERN R. CO.*, U. S. C. C. (S. Car.), 74 Fed. Rep. 70.

11. CARRIERS OF GOODS—Right of Consignor.—The shipper of goods, after delivery to the carrier and receipt of bill of lading, may make the delivery to the consignee conditional on the latter's payment of a draft, provided the bill of lading has not been forwarded to the consignee, or some one for his use.—*LOUISVILLE & N. R. Co. v. HARTWELL*, Ky., 36 S. W. Rep. 183.

12. CARRIERS—Injuries in Foreign State.—In an action in a local court for personal injuries sustained in a foreign State, and resulting from a wrong for which a remedy was given at common law, the presumption will prevail that the common law is in force in the foreign State, and the remedy will be applied.—*MEXICAN CENT. RY. Co. v. MITTEN*, Tex., 36 S. W. Rep. 282.

13. CARRIERS—Passenger—Damages.—For the negligence of a conductor in failing to stop at a station, whereby plaintiff, a passenger, was carried beyond her destination, a railroad company is liable for compensatory damages only; and an instruction authorizing the jury to award punitive damages if defendant's agents were "rude and insulting in words, tone or manner," where there was no evidence to authorize a finding of such conduct, was prejudicial error.—*LOUISVILLE & N. R. Co. v. JACKSON*, Ky., 36 S. W. Rep. 173.

14. CARRIERS—Passenger—Mistake in Ticket.—One who asks the ticket agent for a first-class ticket, and missing the train, though proceeding immediately after getting the ticket to the depot, takes the next train the following morning, and is put off it, the ticket proving to be a first-class limited ticket, out of date the day previous, may maintain an action of tort for forcible ejection.—*LOUISVILLE & N. R. Co. v. GAINES*, Ky., 36 S. W. Rep. 174.

15. CARRIERS—Passenger—Negligence.—It is not negligence *per se* for a passenger on a rapidly moving train to attempt to pass out of one car into another, in search of a seat.—*CHESAPEAKE & O. RY. Co. v. CLOWES*, Va., 24 S. E. Rep. 933.

16. CARRIERS—Passengers—Negligence.—Plaintiff, a passenger upon defendant's train, was injured while passing from one coach to another as the train was, as he believed, about to stop for a station other than that of his destination, by being thrown from the platform of the coach by a sudden jerking motion. There was no evidence that the jerk was not such as is usual in stopping and starting trains under ordinary circumstances: Held, that the evidence was, as a matter of law, insufficient to warrant a recovery.—*CHROATE v. SAN ANTONIO & A. P. RY. Co.*, Tex., 36 S. W. Rep. 247.

17. CHATTEL MORTGAGE—Verbal Lien.—A parol agreement between the mortgagor and mortgagee of chattels, by which the mortgagor is permitted to exchange property covered by the mortgage for other property, which is to be subject to the mortgage lien in the place of that exchanged, is valid as between the parties, though the property remains in the possession of the mortgagor.—*LEEDS v. REED*, Tex., 36 S. W. Rep. 347.

18. CONSTITUTIONAL LAW—Interstate Commerce.—A train consisting of empty freight cars being prepared, and taken to a point without the State, for the purpose of transporting coal within the State from such point, is not engaged in interstate commerce.—*NORFOLK & W. R. Co. v. COMMONWEALTH*, Va., 24 S. E. Rep. 837.

19. CONSTITUTIONAL LAW—Taxation—Interstate Commerce.—Sections 1738-1743, both inclusive, of the Revised Codes, are unconstitutional and void so far as they attempt to tax persons engaged in the occupation of offering for sale by samples in this State goods to be shipped into it from another State, to fill the orders for goods so obtained. They are void as unlawfully interfering with interstate commerce. The statutes, being void as to such persons, are void as to all others, as it cannot be assumed that the legislature would have discriminated against the business interests of the State by passing a law imposing burdens upon

such interests which would not affect similar business interests of non-residents, the precise contrary being shown by the provisions of the act.—*STATE v. O'CONNOR*, N. Dak., 67 N. W. Rep. 824.

20. CONTINUANCE—Discretion of Trial Court.—A refusal to grant plaintiff a continuance will not be disturbed where the record shows that the application was made at the close of defendant's evidence to obtain evidence to rebut alleged new matter, and on an affidavit which did not specify the facts he wished to rebut, the evidence he intended to adduce, or name the witnesses who would give it, and that on the hearing affidavits of plaintiff and a witness, whom he presumably wished to introduce, were allowed in evidence.—*GAINES v. WILSON*, Va., 24 S. E. Rep. 823.

21. CONTRACT—Breach—Waiver.—Where title to lands, procured by plaintiff for defendant under a contract to furnish good and sufficient title, failed, and defendant made a new contract with plaintiff to procure a good title for him to the same lands, the new contract, and payment of further money thereunder, was a settlement of the entire matter, and a waiver by defendant of all claims against plaintiff for indemnity for failure of the title procured under the first contract.—*BESHOAR v. ROBARDS*, Colo., 45 Pac. Rep. 280.

22. CONTRACTS—Consideration—Statute of Frauds.—The reasonable clearness with which the consideration for an agreement, promise, or undertaking in writing must appear, when the consideration is not expressly stated, in order to satisfy the statute of frauds (Gen. St. 1894, § 4209), cannot be made to depend on what may be conjectured from what has been written.—*SIEMENS v. SIEMENS*, Minn., 67 N. W. Rep. 802.

23. CONVERSION.—Where a tenant who sowed wheat on shares assigned his interest before harvest, a sale of the tenant's share by the landlord, whether made before or after the assignment, and his refusal to let the assignee remove the same, gave the latter a right of action against the landlord for conversion.—*DALL v. JONES*, Ind., 44 N. E. Rep. 316.

24. CORPORATION—Foreign Corporations—Conditions Precedent.—A State may lawfully prohibit foreign corporations—other than those engaged in interstate or foreign commerce, or which are employed by the federal government, from transacting business in the State without first obtaining a permit.—*HUFFMAN v. WESTERN MORTGAGE & INVESTMENT Co.*, Tex., 36 S. W. Rep. 306.

25. CORPORATIONS—Bondholders.—Provisions in corporate bonds, or in the trust deed securing them, that a specified majority in value of the bondholders may, by their action, bind the minority to any alteration, modification, or compromise of their rights against the corporation or its property, including a postponement of the time of payment of interest or principal, are enforceable only when the majority exercise an honest discretion in the interest of all; and an agreement by a corrupt or collusive majority, waiting conditions and postponing the payment of interest for the purpose of compelling the minority to sell out to them on terms of their own dictation, would not bind the minority.—*HACKETTSTOWN NAT. BANK v. D. G. YUENGLING BREWING Co.*, U. S. C. C. of App., 71 Fed. Rep. 110.

26. CORPORATIONS—Insolvency—Distribution of Assets.—Claims against an insolvent corporation were of three classes—claims based on a guaranty of negotiable notes, claims based on a guaranty of mortgage notes securing the debenture bonds, and claims based on debenture bonds. Plaintiff was trustee of a fund under a trust indenture executed in 1886 by the corporation, the instrument reciting that the fund was to be held as collateral security for the faithful keeping and performance by the corporation of its guaranties. At that time the corporation was engaged only in guarantying and selling personal or corporate obligations. Afterwards it entered in the business of selling the debenture bonds, for the security of which it created

other trust funds under other trust indentures: Held, that the trust fund in plaintiff's hands was liable for the first class of obligations in preference to the claims of any other class.—*AMERICAN LOAN & TRUST CO. V. NORTHWESTERN GUARANTY LOAN CO.*, Mass., 44 N. E. Rep. 340.

37. CORPORATIONS—Seal—Ratification.—Where a seal which had not been formally adopted by a corporation was used for the first time in the execution of instruments afterwards in question, the finding that it had become the common seal of the corporation by use is sustained by a showing that it had afterwards been employed as the seal of the corporation in all transactions requiring the impress of a seal.—*BLOOD V. LA SERANA LAND & WATER CO.*, Cal., 45 Pac. Rep. 252.

38. COUNTIES—Payment of Warrants.—A county warrant, duly issued for the legitimate expenses of the county, and which, together with prior warrants issued for the same purpose during the same year, does not exceed in amount the revenue provided for that year, is valid, though a sufficient amount may not be collected from such levy to pay all warrants so issued.—*STATE V. SCHELL*, Mo., 36 S. W. Rep. 206.

39. COUNTY WARRANTS—Estoppel by Acceptance.—Where county warrants issued to the coroner provide that the delinquent taxes due from such officer shall be deducted from the amount of the warrants, such provision is binding on the officer on acceptance of the warrants, whether authorized or not.—*STATE V. MILLER*, Ind., 44 N. E. Rep. 809.

40. COVENANT—Seisin—Burden of Proof.—In an action for breach of a covenant for seisin, it is sufficient for plaintiff to negative the words of the covenant, and the burden of proof rests on a defendant who alleges seisin; but, to be entitled to substantial damages, plaintiff must show that defendant was not seized of an indefeasible estate.—*EVANS V. FULTON*, Mo., 36 S. W. Rep. 230.

41. CRIMINAL EVIDENCE—Dying Declarations.—Dying declarations in cases of homicide form an exception to the rule against the admissibility of hearsay evidence. To render such declarations admissible, the judge must be fully satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope whatever of recovery. This absence of all hope of recovery, and appreciation by the declarant of his speedy and inevitable death, are a preliminary foundation that must always be laid to make such declarations admissible. It is a mixed question of law and fact for the judge to decide, before permitting the introduction of the declaration itself.—*LESTER V. STATE*, Fla., 20 South. Rep. 232.

42. CRIMINAL EVIDENCE.—In a murder case, where there was evidence that a witness for the State had made statements out of court contrary to his testimony, it was proper to admit, in rebuttal, extracts from his testimony at the inquest which corresponded with his testimony on the trial.—*SIMS V. STATE*, Tex., 36 S. W. Rep. 256.

43. CRIMINAL LAW—Absence of Defendant.—A defendant may appear by counsel in any misdemeanor case, though it be punishable by imprisonment, but in no case can there be judgment of imprisonment without having the defendant present at its rendition.—*STATE V. CAMPBELL*, W. Va., 24 S. E. Rep. 875.

44. CRIMINAL LAW—Bill of Exceptions.—In a criminal prosecution, an order of the court allowing 90 days in which to file a bill of exceptions is void as to the excess of 60 days, to which time the allowance is expressly limited by Rev. St. 1894, § 1916.—*HOUSTON V. STATE*, Ind., 44 N. E. Rep. 317.

45. CRIMINAL LAW—Evidence—Conduct of Accused.—The demeanor of a person, not under restraint, when accused of a crime, as well as what he says, or his silence, may be shown as incriminatory facts, their weight as evidence being for the jury.—*STATE V. HILL*, Mo., 36 S. W. Rep. 223.

46. CRIMINAL LAW—Former Jeopardy—Constitutional Guaranties.—Const. art. 1, § 7, that "no person shall, after an acquittal, be tried for the same offense," is a guaranty of the right stated, and not a limitation of the right of a defendant to have his trial, when begun, proceed, unless sufficient ground is shown for its discontinuance; and, while the court is vested with a discretion to determine what grounds are sufficient for a discontinuance, it is a legal discretion, to be exercised only upon legal evidence, and by judicial finding.—*STATE V. NELSON*, R. I., 34 Atl. Rep. 990.

47. CRIMINAL LAW—Information.—Upon a prosecution by affidavit and information, where the affidavit failed to allege the county in which the offense was committed, the information founded thereon was bad, even though the venue was properly laid in the information.—*RICE V. STATE*, Ind., 44 N. E. Rep. 320.

48. CRIMINAL LAW—Larceny.—A person taking an article, without the consent of the owner, but with the intent of allowing him the value of the article on settlement of their accounts, is not guilty of larceny.—*YOUNG V. STATE*, Tex., 36 S. W. Rep. 272.

49. CRIMINAL LAW—Verdict.—No legal sentence can be pronounced in a felony case upon a verdict rendered and received by the court during the prisoner's absence.—*SUMMERALLS V. STATE*, Fla., 20 South. Rep. 242.

40. CRIMINAL PRACTICE—Adultery—Complaint.—The complaint, warrant, and information in a prosecution for adultery need not allege that the complainant was defendant's wife. It is enough that it appears that the marriage was admitted before the examining magistrate by defendant's attorney, the presumption being that the admission was in defendant's presence, and was binding on him.—*PEOPLE V. ISHAM*, Mich., 67 N. W. Rep. 819.

41. CRIMINAL PRACTICE—False Pretenses.—An indictment alleged that defendant did falsely, etc., represent to C that he was the owner of, and had the right to sell to C for \$75, a diamond stud, and by reason, etc., said C was induced to part with the possession and ownership of said money; defendant knowing such pretensions and representations to be false, in that he did not own the stud, and he had no right to sell it to C: Held, that the indictment did not charge a sale and delivery of the stud, and was bad.—*CUMMINGS V. STATE*, Tex., 36 S. W. Rep. 266.

42. CRIMINAL PRACTICE—Indictments—Several Offenses.—By the great weight of authority the prosecutor is at liberty to charge, in a single count, as a single offense, a single act or transaction in violation of law, although that act or transaction involves several similar violations of law with respect to several different persons. The application of this rule to indictments in the federal courts is not affected by the provisions of Rev. St. § 1024, in relation to the joinder of several offenses in different counts of the same indictment.—*UNITED STATES V. SCOTT*, U. S. C. C. (Ky.), 74 Fed. Rep. 213.

43. DEED—Cancellation—Fraud.—A conveyance of property, fully executed, and which was not in itself either illegal or fraudulent, though made for the purpose of assisting in the perpetration of a fraud by the grantee, will not be set aside by a court of equity at the suit of the grantor, and for his benefit.—*WALTON V. BLACKMAN*, Tenn., 36 S. W. Rep. 195.

44. DEED—Recording—Notice.—Under Rev. St. 1895, art. 4639, authorizing the record of "conveyances or other instruments in writing concerning lands," the record of an instrument purporting to convey grantor's expectant interest in his sister's estate, with warranty of title, is notice to creditors and subsequent purchasers of the grantor.—*HALE V. HOLLON*, Tex., 36 S. W. Rep. 233.

45. DEDICATION.—A dedication of land for a street or road need not be in writing, but may be made in any manner which clearly and unequivocally indicates the intention of the owner: and a dedication, when made

and accepted, by act of the authorities or by user, is irrevocable, and the right of the public cannot be affected by a subsequent occupation of the land by the owner of the fee, or another.—*BUNTIN V. CITY OF DANVILLE, Va.*, 24 S. E. Rep. 880.

46. **EVIDENCE—Fraud.**—In an action for the recovery of personal property, where the plaintiff's claim is based on the alleged fraud and misrepresentation of the defendant in obtaining possession thereof, testimony to show that defendants had been guilty of gross fraud in transactions with other persons not parties to the suit was inadmissible.—*LEVY V. LEE, Tex.*, 36 S. W. Rep. 309.

47. **EXECUTION—Sale—Inadequacy of Price.**—Where the purchaser at execution sale purchased for \$25 lands admitted to be worth at least \$500, there is such a gross inadequacy of price as to warrant setting aside the sale for irregularity, when it appears that the execution was prematurely issued, and the description of the property levied on was insufficient.—*HOUSE V. ROBERTSON, Tex.*, 36 S. W. Rep. 251.

48. **FEDERAL COURTS—Admission of Territories—Pending Causes.**—The government of the United States retains constitutional power to punish, through its courts, a crime committed against it in one of the territories, although such territory is admitted as a State pending the prosecution, and before conviction.—*UNITED STATES V. BAUM, U. S. C. C. (Utah)*, 74 Fed. Rep. 43.

49. **FEDERAL COURTS—Circuit Court of Appeals.**—When the record upon an appeal from the circuit court to the circuit court of appeals presents both a question as to the jurisdiction of the former court, and other questions, which, if the circuit court is found to have had jurisdiction, must be disposed of, the court of appeals has jurisdiction, of the appeal, and must consider the question of the jurisdiction of the circuit court, although that court has dismissed the case for want of jurisdiction, and the circuit court of appeals act provides (section 5) that, where the question is alone of jurisdiction, it is to be certified to the supreme court.—*COLOR V. GRAINGER COUNTY, U. S. C. C. of App.*, 74 Fed. Rep. 16.

50. **FEDERAL COURTS—State Statutes.**—The statute of a State providing for the filing of bills in equity for the enforcement of the liability of stockholders in corporations, does not authorize a federal court to entertain such a bill, where no special ground of equitable cognizance exists.—*ALDERSON V. DOLE, U. S. C. C. of App.*, 74 Fed. Rep. 29.

51. **FEDERAL COURTS—Jurisdiction—Directors of National Bank.**—An action against directors of a national bank for damages for inducing the plaintiff, by false representations contained in the reports made by them in accordance with the statutes and the regulations of the comptroller of the currency, to loan money to the bank, which he lost through its insolvency, does not present a controversy arising under the constitution or laws of the United States, of which the federal courts have jurisdiction, either originally or by removal.—*BAILEY V. MOSHER, U. S. C. C. (Neb.)*, 74 Fed. Rep. 15.

52. **FEDERAL OFFENSE—Passing Counterfeit Bills.**—Upon a trial of an indictment charging the defendant and others with passing counterfeit bills, after evidence tending to show that he had supplied the bills to the persons who actually distributed them, the circumstances of the defendant, showing his situation and relations with other persons in whose possession bills from the same plate had been found in large quantities, are admissible in evidence as parts of the *res gestæ*, and as showing his facilities for supplying the bills and the commission of the offense.—*UNITED STATES V. TARANTO, U. S. D. C. (N. Y.)*, 74 Fed. Rep. 219.

53. **FRAUDULENT CONVEYANCES.**—Under Rev. St. 1895, art. 2545, providing that all voluntary conveyances not based on a valuable consideration shall be void as to existing creditors of the grantor, unless it appears that such grantor was possessed of property within

the State, subject to exemption sufficient to pay his existing debts, a voluntary conveyance is void, though the grantor has sufficient property to pay his debts, where such property is concealed in the name of third persons.—*WALKER V. LORING, Tex.*, 36 S. W. Rep. 16.

54. **HOMESTEAD—Sale and Repurchase by Widow.**—A widow having a right of homestead in lands left by her husband, who, with the heirs, made an executory sale of the property, retaining a vendor's lien, and taking a trust deed securing the purchase money, with the intention of acquiring another homestead when the purchase money was paid, but who on its non-payment, not having acquired a new homestead, foreclosed the trust deed, and repurchased the property, with the intention of resuming its occupancy as a homestead, which she did on regaining possession, will not be held to have lost her homestead right, as against a creditor obtaining and registering a judgment after her repurchase of the property.—*SMITH V. WRIGHT, Tex.*, 36 S. W. Rep. 824.

55. **HOMESTEAD—What Constitutes.**—Where defendants executed a deed of trust, in which they covenanted that the premises conveyed were not a part of their homestead, and that they had a homestead elsewhere, occupied by them as such, a finding that the property so conveyed was not the homestead will not be disturbed where it appears that at the time of the execution of the trust deed defendants did not in fact regard the property as a homestead, but occupied other lands as residence and business homesteads.—*HOWELL V. STEPHENSON, Tex.*, 36 S. W. Rep. 302.

56. **INJUNCTION—Action at Law.**—Where plaintiff has sued in a justice court which has complete jurisdiction of his case, but has not jurisdiction sufficiently broad to enable it to entertain defendant's counterclaim, which grows out of the same transaction, and involves the same precise issue, so that the determination of plaintiff's case could be pleaded as a bar to defendant's, defendant can enjoin further proceedings, and have the case determined in a court having jurisdiction of the whole controversy.—*GREGORY V. DINEEN, Cal.*, 45 Pac. Rep. 261.

57. **INJUNCTION—Enjoining Collection of Default Judgment.**—In a suit by a foreign insurance corporation to enjoin the enforcement of a default judgment against it, mere allegations that service was made on agents not authorized to receive the same, instead of upon the duly-authorized State officer, and that defendants "remained silent," and "concealed" the fact of such service, until after the end of the term at which the judgment was rendered, are not sufficient grounds for granting an injunction, in the absence of any averment that complainant did not in fact have any knowledge of the suit in time to make a defense.—*MASSACHUSETTS BENEFIT LIFE ASS'N V. LOHMEYER, U. S. C. C. of App.*, 74 Fed. Rep. 28.

58. **INJUNCTION—Petition.**—A petition for an injunction against threatened injury which fails to allege the acts from which the injury will result, or what the injuries will be, is insufficient.—*OTIS V. SWEENEY, La.*, 20 South. Rep. 229.

59. **INSOLVENCY—Effect as to Non-resident.**—State insolvent laws cannot and do not affect debts due to non-resident creditors, unless such creditor voluntarily makes himself a party to the insolvent proceedings instituted under such State law.—*ROSENHEIM V. MORROW, Fla.*, 20 South. Rep. 243.

60. **INSURANCE—Conditions in Policy.**—Before the execution of a policy the power and authority of a local and soliciting agent are coextensive with the business intrusted to his care, and his positive knowledge as to material facts, and his acts and declarations within the scope of his employment, are obligatory on his principal, unless restricted by limitations well known to the other party at the time of the transaction. Therefore the knowledge, acts, and declarations of such agent during the negotiations previous to the execution of the policy may be proved upon a question as to whether a particular condition con-

ained in the policy as issued was binding on the insured.—**WEST END HOTEL & LAND CO. v. AMERICAN FIRE INS. CO. OF NEW YORK**, U. S. C. C. (N. Car.), 74 Fed. Rep. 114.

61. **INTOXICATING LIQUORS**—Information.—Under Pen. Code, § 397, as amended in 1893, which provides that "every person who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any Indian, is guilty of a felony," an information charging that defendant, April 20, 1896, "at and in the county did willfully, unlawfully, and feloniously furnish, and cause to be furnished, intoxicating liquor," etc., does not charge two offenses, since to "furnish and cause to be furnished" constitute but one and the same act.—**PEOPLE v. GUSTI**, Cal., 45 Pac. Rep. 263.

62. **INTOXICATING LIQUORS**—Sale—Tenement.—A building occupied as a dwelling, whether attached to the land or not, is a "tenement," within the meaning of the statute prohibiting the keeping and maintaining of a tenement for the illegal keeping and sale of intoxicating liquor.—**COMMONWEALTH v. MULLEN**, Mass., 44 N. E. Rep. 343.

63. **JUDGMENT**—Impeachment of Foreign Judgment.—The validity of a judgment of another State cannot be impeached for any supposed defect or irregularity in the transaction on which it was founded, and no defense can be interposed in an action upon such judgment upon matters existing before its recovery.—**FIRST NAT. BANK OF CITY OF BROOKLYN v. WALLIS**, N. J., 34 Atl. Rep. 983.

64. **JUDGMENT**—Receiver—Supplementary Proceedings.—Where a judgment creditor's demand is secured by mortgage, a receiver of the judgment debtor's property may be appointed in supplementary proceedings, although the creditor has not exhausted his mortgage security.—**BEAN v. HERON**, Minn., 67 N. W. Rep. 805.

65. **LANDLORD AND TENANT**—Unauthorized Agreement.—A landowner cannot be bound by an agreement concerning boundaries signed by her tenant at will without authority, and such an instrument is inadmissible to affect her interest in the lands.—**COX v. DAUGHERTY**, Ark., 36 S. W. Rep. 184.

66. **LIBEL**—Evidence.—In an action for libel, the statement of the article, that plaintiff had "been in more rows than any other one man in this county," being averred by the answer to be true, evidence of many instances of quarrels and disturbances in which plaintiff had been concerned is admissible in support thereof.—**RATCLIFF v. LOUISVILLE COURIER-JOURNAL**, Co. Ky., 36 S. W. Rep. 177.

67. **LIBEL**—What Actionable.—Written publications calculated to expose a person to public contempt and ridicule, and thereby impair him in the good opinion and respect of others, are libelous, although they involve no imputation of crime.—**BYRAM v. AIKIN**, Minn., 67 N. W. Rep. 807.

68. **LIEN**—Convention of Lienholders.—A convention of lienholders, under the statute on publications of notice to present their liens against the land of a party, will not bar the purchase money lien of a vendor of such land, who retains the legal title, not an actual party to the suit. Nor is lien reserved in a deed passing the title barred by such convention, unless its owner be an actual party.—**BENSON v. SNYDER**, W. Va., 34 S. E. Rep. 880.

69. **LOST INSTRUMENT**—Secondary Evidence.—A party seeking, upon the trial of an action, to introduce secondary evidence of the contents of an alleged lost instrument, must not only give some evidence that it once existed, but also that a *bona fide* and diligent search has been unsuccessfully made for at the place where it was most likely to be found. Whether sufficient search has been made depends much on the nature of the instrument and the circumstances of the case, as a comparatively useless writing may be presumed to have been lost or destroyed on proof of much less search, and after a much shorter time, than an

important one.—**SLOCUM v. BRACY**, Minn., 24 S. E. Rep. 843.

70. **MARRIED WOMAN**—Estoppel—Mortgage.—A married woman is not estopped to claim property mortgaged by her husband, as her own, because she failed to inform the mortgagee of her ownership, where she was not guilty of collusion or fraud, and did nothing to induce the taking of the mortgage, no duty resting upon her to act affirmatively in the premises.—**ROBERTS v. TRAMMEL**, Ind., 44 N. E. Rep. 321.

71. **MASTER AND SERVANT**—Assumption of Risk.—While it is the duty of a master to provide a reasonable safe place in which his servant may perform his work, yet he may conduct his business in the way that seems to him best, although less hazardous methods might be employed; and in such case, if the servant knows and comprehends or is reasonably warned of the dangers, he assumes the risk of the more hazardous method. A servant of mature age and of experience is charged by the law with knowledge of obvious dangers, and of those things which are within common observation, and according to natural law, and in such cases the master need not give warning of possible danger of which both parties had equal knowledge.—**MISSISSIPPI RIVER LOGGING CO. v. SCHNEIDER**, U. S. C. C. of App., 74 Fed. Rep. 135.

72. **MASTER AND SERVANT**—Assumption of Risks.—A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care.—**MOTLEY v. PICKLE MARBLE & GRANITE CO.**, U. S. C. C. of App., 74 Fed. Rep. 153.

73. **MASTER AND SERVANT**—Contract of Hiring.—Plaintiff alleged that defendant agreed to give him regular work as freight conductor, and "that said regular work would continue so long as this plaintiff did faithful and honest work," at a specified compensation per month: Held, that the contract was indefinite as to term of service, and terminable at any time by either party.—**LOUISVILLE & N. R. CO. v. OFFUTT**, Ky., 36 S. W. Rep. 181.

74. **MASTER AND SERVANT**—Negligence.—Inspection of Machinery.—When the duty which a master owes to a servant respecting machines furnished for the servant to work with requires inspection of the machines, the duty will be performed by such an inspection as ordinary prudence would dictate.—**ATZ v. NEWARK LIME & CEMENT MANUFACTURING CO.**, N. J., 34 Atl. Rep. 980.

75. **MASTER AND SERVANT**—Pleading—Negligence.—A complaint in an action against an employer, a corporation, and its officers, for personal injuries, alleging merely negligence on the part of defendants in the construction of its building and in employing an incompetent foreman, is insufficient, as against the officers, for failure to show the duties assigned by the corporation to the officers.—**HENRY v. BRACKENRIDGE LUMBER CO.**, La., 20 South. Rep. 221.

76. **MASTER AND SERVANT**—Scope of Employment.—The liability of a master, in cases of injury to his servant, received in a dangerous employment outside of that for which he had engaged, arises not from the direction of the master to the servant to depart from the one service and engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger, in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger.—**REED v. STOCKMEYER**, U. S. C. C. of App., 74 Fed. Rep. 186.

77. **MECHANIC'S LIEN**—Rights of Non-residents.—The right to the benefit of the mechanic's lien law does not depend upon such incidents of the contract of a material-man as relate to its character or the place of payment, but solely upon the fact that the claimant has performed labor upon, or furnished materials to, a building within the State; and the fact that a contractor and a subcontractor for a building to be erected in New York were both residents of New Jersey, and that the subcontract was there made, will not deprive

the subcontractor of a lien for materials which he furnished, in compliance with the terms of his contract, "at and for the building" in question.—*CAMPBELL V. COON*, N. Y., 44 N. E. Rep. 300.

78. MORTGAGE—Deed of Trust—Foreclosure.—The fact that a purchaser at a sale under a trust deed had acted as intermediary in making the loan which the deed was given to secure did not render his purchase fraudulent as against the grantor; he being the agent of the borrower, and not of the loan company.—*SEIF V. GRINNAN*, Tex., 35 S. W. Rep. 349.

79. MUNICIPAL CORPORATION—Assessment for Street Paving.—Where a city contracts for paving, limiting its liability to one-third of the cost, and providing that the contractors were to look to the abutting owners for the balance, an assessment by the city for such balance is void.—*CITY OF DALLAS V. EMERSON*, Tex., 36 S. W. Rep. 304.

80. MUNICIPAL CORPORATION—Defective Streets.—A municipal corporation is not an insurer against accidents upon its streets and roads. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets and roads are in a reasonably safe condition for travel in ordinary modes, with ordinary care; and whether so or not is a practical question to be determined in each case by its particular circumstances.—*VAN PELT V. TOWN OF CLARKSBURG*, W. Va., 24 S. E. Rep. 878.

81. MUNICIPAL CORPORATION—Defective Streets.—Where the grade of a street east of a corner lot was maintained by a city on a level with the lot, and that of the street south of it gradually declined from its intersection with the east street so as to leave the lot, about 20 feet from such intersection, several feet above grade, the city was not liable for injuries sustained by one from passing upon the lot from the east street on a dark night, and falling over the embankment into the south street, though it had erected no barrier to prevent persons from entering on the lot from the east street, and the street lights were out; the evidence not showing that the absence of light was due to its negligence.—*CITY OF DENISON V. WARREN*, Tex., 36 S. W. Rep. 296.

82. MUNICIPAL CORPORATION—Liability for Negligence.—An assistant superintendent of streets, appointed, under the city charter, by street commissioners elected by the board of aldermen, and over whose actions in the performance of his duties the board of aldermen exercise no control except by general orders or ordinances passed, is a public officer, for whose negligence or the negligence of whose employees, the city is not liable, though, by direction of the board of aldermen, he is engaged in constructing a new street which it has laid out.—*JENSEN V. CITY OF WALTHAM*, Mass., 44 N. E. Rep. 339.

83. MUNICIPAL CORPORATION—Nuisance—Trees on Sidewalk.—The determination of the common council of a city (given by the city charter the care and control of the streets, with power to define, prevent, and remove nuisances) that trees two to five feet in diameter, standing in the center of a sidewalk twelve feet wide, constitute a nuisance, cannot be reviewed.—*VANDERHURST V. THOLCKE*, Cal., 45 Pac. Rep. 266.

84. MUNICIPAL CORPORATION—Street Improvements.—An abutting owner who agrees with one having a contract with a city to improve a street to pay his *pro rata* share of the cost of improving the street is personally liable for such amount if the improvement is completed in accordance with the contract.—*BURTON V. LAING*, Tex., 36 S. W. Rep. 298.

85. MUNICIPAL CORPORATIONS—Use of Street by Railroad Company.—Where a city council, in accordance with the charter, has granted to a railroad company a right of way over certain streets, the fee of which is in the public, the owners of a majority of front feet having consented to the grant, the appropriation of such way is not a "taking," within Const. art. 1, § 17, requiring compensation to be first made.—*GRAY V. DALLAS*

TERMINAL RAILWAY & UNION DEPOT CO., Tex., 36 S. W. Rep. 352.

86. MUNICIPAL CORPORATIONS—Waterworks—Overflow of Standpipe.—Where a city has placed a standpipe on private lands by a contract under which it paid a money consideration for the privilege, and agreed as a further consideration that it would pay any damage which might accrue, it is liable for damages resulting from an overflow of the standpipe, regardless of the question of negligence in the operation of its waterworks.—*HARTER V. CITY OF MARSHALL*, Tex., 36 S. W. Rep. 294.

87. NATIONAL BANKS—Action against Directors.—An action against the directors of a national bank under the provisions of Rev. St. § 5239, can be maintained only by a receiver of the bank; and an action by a private individual against such directors for damages arising from the making of false reports or other violations of the national banking act can only be maintained as an action at the common law in the nature of an action of deceit.—*GERNER V. THOMPSON*, U. S. C. C. (Neb.), 74 Fed. Rep. 125.

88. NATIONAL BANKS—Sale of Collateral.—A national bank which had assumed to sell for another certain notes owned by him, but had, instead of so selling them to a third person without his knowledge, sold them to itself, had violated its duty to the owner, the same as if it had full power under the law to act as such agent, and was, therefore, guilty of a conversion of such notes.—*ANDERSON V. FIRST NAT. BANK OF GRAND FORKS*, N. Dak., 67 N. W. Rep. 821.

89. NEGLIGENCE—Comparative Negligence.—When the facts stated in the charge would unquestionably constitute contributory negligence on the part of plaintiff, it is error to charge that, if the jury "further believe that he was injured by (defendant's) gross negligence, if any, as hereinbefore explained; that such negligence, if any, was the immediate, proximate cause of said injury—then you will find for plaintiff," since the charge involves the repudiated doctrine of comparative negligence.—*MISSOURI, K. & T. Ry. Co. OF TEXAS V. RODGERS*, Tex., 36 S. W. Rep. 248.

90. NEGOTIABLE INSTRUMENTS—Pleading as Evidence.—In an action on a promissory note, where defendants have set out in their answer an agreement under which they received the note, the agreement is a part of defendants' admissions, and may be considered by the court in determining whether plaintiff has made out his case.—*KIRBY V. SCANLAN*, S. Dak., 67 N. W. Rep. 828.

91. NUISANCES—License—Legislative Sanction.—The legislature may sanction the location and maintenance of an iron foundry in a city, though it would have constituted a nuisance at common law, so as to prevent property owners specially injured from suing to enjoin its maintenance.—*MURTRA V. LOVEWELL*, Mass., 44 N. E. Rep. 347.

92. OFFICERS—Lieutenant Governor Acting as Governor—Compensation.—Under the constitutional provision that, on the death of the governor, the powers and duties of the office shall devolve on the lieutenant governor, the lieutenant governor, whom the duties of the office of governor devolve upon by reason of the death of the governor, is entitled to receive the salary attached to the governor's office.—*STATE V. LA GRANGE*, Nev., 45 Pac. Rep. 243.

93. PARENT AND CHILD—Custody of Infants.—Though the custody of an infant born out of wedlock legally belongs to the mother, as its natural guardian, when it appears that she is not a suitable person to have the custody, and that the best interests of the child would be served by placing it in the custody of another, the court may, in its discretion, so order; the paramount consideration being the welfare of the child.—*IN RE HOPE*, R. I., 84 Atl. Rep. 994.

94. PARTNERSHIP—Dissolution.—A creditor of a firm doing business under the sole name of one of the partners, the business being conducted by the other, can enforce a note signed in the firm name by the manager

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ing partner after dissolution of the partnership for a firm debt, where it was in accordance with the former course of dealing, and the creditor was not notified of the change.—*WHITE V. HUDSON, Tex.*, 36 S. W. Rep. 332.

9. **PARTNERSHIP—Dissolution.**—On the dissolution of a partnership, and sale of the business to a third person, not theretofore interested in the business, the partners are not required to give reasonable notice of the dissolution to the persons from whom they were accustomed to purchase goods, to relieve them from liability for purchases made by their vendee in the old partnership name, which was used without their authority.—*JACKSON V. LEE, Tex.*, 36 S. W. Rep. 286.

10. **PARTNERSHIP—What Constitutes.**—An agreement, indefinite as to its continuance, which provides for the selling on commission, or the purchase and sale at a profit, of several tracts of land, the deduction from the net profits, whether money or land, of the expenses incurred, and a division of these profits equally between the parties, each of whom is to use his time and skill to effect the sale or sales, renders such parties partners, though no agreement was made as to sharing the losses; and either is entitled to an account in equity to ascertain the result of the enterprise.—*JONES V. MURPHY, Va.*, 24 S. E. Rep. 825.

11. **PATENTS—Transfer.**—A transfer of a right to make and use a patented appliance upon a particular number of machines is a license merely, and not a grant of an interest in the patent.—*FT. WAYNE, C. & L. R. Co. V. HABERKORN, Ind.*, 44 N. E. Rep. 822.

12. **PAYMENT—Tender—Keeping Tender Good.**—In order to stop interest, it is not necessary that one making a tender should set the money aside, and hold it continuously subject to the order of the creditor, but he may use it as his own, and is only under obligation to be ready at all times to pay the debt in current money when requested.—*CHENEY V. BILBY, U. S. C. R. of App.*, 74 Fed. Rep. 52.

13. **PRINCIPAL AND AGENT—Betrayal of Trust—Profits.**—An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission as agent, and becomes indebted to his principal for the profits he gains by his breach of duty.—*MCKINLEY V. WILLIAMS, U. S. C. R. of App.*, 74 Fed. Rep. 94.

14. **PRINCIPAL AND AGENT—Double Agency—Voidable Agreement.**—Defendant authorized R, as his agent, to purchase for him 100 shares of stock in a corporation of which R was president; R representing that the company had no stock unsold, but that he could induce other stockholders to surrender some of their stock at a premium. At that time the company held some shares of stock which had been surrendered without premium, and these, with others afterwards obtained, were transferred to defendant at a premium on the whole amount, the company receiving over half of the premiums so paid: Held, that the agreement to purchase was voidable at the election of defendant, on the ground of the double agency of R.—*McDONALD V. OHIO VAL. IMPROVEMENT & CONTRACT CO.'S ASSOCIATES, Ky.*, 36 S. W. Rep. 175.

15. **PRINCIPAL AND SURETY.**—When it appears from a contract entered into by a husband and wife that she is simply a surety for the payment of his individual debt, and he dies, leaving an estate amply sufficient to pay and discharge all claims against it, if duly presented and allowed, it is incumbent upon the creditor to present his claim against such estate. If he fails so to do within the period fixed for the presentation and allowance of such claims, the surety is released from further personal liability on the contract.—*CHIBERT V. QUESNEL, Minn.*, 67 N. W. Rep. 803.

16. **PRINCIPAL AND SURETY—Guardian's Bond—Release.**—Where the probate records show that a guardian after final accounting, of which his ward had notice, was, on petition of the ward (which declared

that he had the funds on hand ready for transfer), appointed trustee of the balance of the funds shown on hand by his final account; that he was ordered to transfer the funds to himself as trustee; and that he filed a receipt from himself as trustee for them; and it appears that his trusteeship continued for two years, during which the *cestui que trust* received for moneys received from him as trustee—the *cestui que trust* is estopped, as against the sureties on his guardian's bond, from claiming that he never in fact transferred the funds to himself as trustee, but converted them while guardian, if he at the time of transfer was possessed of property out of which the balance found due on his final accounting as guardian could have been collected.—*STATE V. BRANCH, Mo.*, 36 S. W. Rep. 226.

103. **RAILROAD COMPANY—Street Car Companies—Contributory Negligence.**—Where the evidence is absolutely silent as to the acts of decedent from the time he left a street car at a street crossing till he was struck by a street car moving in the opposite direction on a parallel track, and such interval was long enough to have permitted him to cross the street in safety, it will not be presumed that he was free from contributory negligence, though the car was run over the crossing in a reckless and negligent manner.—*EVANSVILLE ST. R. CO. V. GENTRY, IND.*, 44 N. E. Rep. 311.

104. **RAILROAD COMPANY—Receivers—Judgment.**—A judgment rendered against the receiver of a railroad, after he has been discharged and the property restored, does not bind either the company or the property.—*TEXAS & P. RY. CO. V. WATSON, Tex.*, 36 S. W. Rep. 290.

105. **RAILROAD COMPANY—Electric Railway—Negligence.**—It is not, in itself, negligence to start an electric street car in the ordinary manner, and in the ordinary course of the operation of such car, while a team of horses, which manifest no symptoms of fright, is being driven past it.—*McDONALD V. TOLEDO CONSOL. ST. RY. CO., U. S. C. C. of App.*, 74 Fed. Rep. 104.

106. **RAILROAD COMPANY—Accident—Contributory Negligence.**—Although a person approaching a railroad track may know that no regular train is then due, it is no less a duty to stop and look and listen before attempting to cross; and a failure to do so, when such precaution would have disclosed a train approaching, was negligence so contributing to the death of the person, by being struck on the crossing by the train, as to prevent a recovery therefor, it appearing that proper signals were given by those in charge of the train, and no negligence on their part being shown.—*VINCENT V. MORGAN'S L. & T. RAILROAD & STEAMSHIP CO., La.*, 29 South. Rep. 207.

107. **RAILROAD COMPANIES—Accident at Crossing.**—In an action for the death of plaintiff's intestate, it appeared that decedent was driving along a country road; that, when he came to a point within 30 or 40 feet of a railroad crossing, where he was free from all danger of collision with trains on the road, he could have seen up the track to the west a distance of 600 to 1,000 feet; that a train was then approaching in full sight from that direction; and that he did not look at the train, or else deliberately attempted to cross in front of it: Held, that a demurrer to the evidence should have been sustained.—*HUGGART V. MISSOURI PAC. RY. CO., Mo.*, 36 S. W. Rep. 220.

108. **RES JUDICATA—Pleading.**—A former recovery may be shown in evidence, under a plea of the general issue, as well as pleaded in bar. When successfully pleaded, it is conclusive upon the parties. If the evidence offered, under a plea of the general issue, to support the contention of *res judicata*, shows that the same subject-matter has already been litigated and adjudicated between the parties by the final judgment of a court of competent jurisdiction, it is as conclusive a bar to any further recovery as though it had been urged by special plea in bar.—*LITTLE V. BARLOW, Fla.*, 20 South. Rep. 240.

109. **SALE—Acceptance by Vendee.**—A vendee's acceptance of property in fulfillment of an executory

contract of sale is a waiver of the objection that it was not delivered at the time agreed, unless his acceptance is qualified by a reservation of the right to claim damages for the delay. — *MINNEAPOLIS THRESHING MACH. CO. v. HUTCHINS*, Minn., 67 N. W. Rep. 807.

110. **SALE—Agent—Claim for Commission.**—Under a contract of agency for the sale of machinery, where the agent brought to the notice of an intending purchaser the machinery manufactured by his principal, and introduced the purchaser to the general agent of the manufacturer—sending him to such general agent to see samples, as instructed—the agent was entitled to a commission on the sale. — *ODUM v. J. I. CASE THRESHING MACH. CO.*, Tenn., 36 S. W. Rep. 191.

111. **SALE—False Representations—Rescission.**—Representations which prove untrue, by the seller of a combination harrow, seeder and cultivator, as to the efficiency of the implement, due to the fact that the wheat sown thereby would not properly germinate, is not ground for rescission, where it appears that the buyer himself tested the implement six weeks before completing the purchase, as by ordinary care he should have discovered such fact prior to the purchase. — *AMERICAN HARROW CO. v. MARTIN*, Ky., 36 S. W. Rep. 178.

112. **TAXATION—Illegal Assessment—Sale.**—An assessment of lands for taxation in the name of a person who has been dead several years is void, and a sale under such assessment conveys no title as against the heirs or representatives of the owner. — *WALSH v. HARANG*, La., 20 South. Rep. 202.

113. **TELEGRAPH COMPANIES — Negligence.**—The sender of a telegram announcing the death of his father may recover for the negligence of the telegraph company in delivering the message, thereby preventing his attending the funeral, for any increase of sorrow or grief at his father's death caused thereby. — *WESTERN UNION TEL. CO. v. WARREN*, Tex., 36 S. W. Rep. 314.

114. **TOWNS — Incorporation — Residents.**—An actual resident, within the meaning of the statute in relation to the incorporation of villages, is one who is in a place with the intent to establish there his domicile or permanent residence, or has done so. — *STATE v. MOTE*, Neb., 67 N. W. Rep. 810.

115. **TRUST—Resulting Trusts.**—The presumption that one purchasing land with funds furnished by another holds the title in trust for the latter is rebuttable. — *ZIMMERMAN v. BARBER*, Penn., 34 Atl. Rep. 1002.

116. **TRUSTS—Public Charity — Power of State.**—The State, as representative of the public, may maintain an action to enforce, or prevent the mismanagement of, a public trust, such as is created by the conveyance of property to trustees, authorized by St. 1855, p. 49, for the founding or maintenance of an institution of learning. — *ELLERT v. COGSWELL*, Cal., 45 Pac. Rep. 270.

117. **TRUSTS—Resulting Trust.**—In order to establish a resulting trust under Comp. Laws, § 2796, providing that when real estate is transferred to any person, the consideration being paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, the payment by or for one who seeks to enforce the trust must be established by substantial proof that the money was actually used for the purchase of the property with the intention that the title should be taken in trust. — *GRAHAM v. SELBIE*, S. Dak., 67 N. W. Rep. 831.

118. **USURY — Commissions to Agents.**—When one negotiates a loan, through a third party, with a money lender, who in good faith lends the money at a legal rate, the contract is not usurious merely because the intermediary charges the borrower a heavy commission; the intermediary having no legal or established connection with the lender, as agent. — *WHALEY v. AMERICAN FREEHOLD LAND-MORTG. CO. OF LONDON*, U. S. C. C. of App., 74 Fed. Rep. 73.

119. **VENDOR AND PURCHASER — Good and Sufficient Deed—Title.**—Where a vendor of land, in his contract of sale, obligates himself to convey "by good and sufficient deed," he does not discharge his covenant by the execution of a deed good merely in point of form, but, fully to comply with his obligation, he is bound to make a good and perfect title to the land contracted to be sold, and to remove any existing incumbrances, or to protect the vendee against it. — *FRAZIER v. BOONE*, Fla., 20 South. Rep. 245.

120. **VENDOR AND PURCHASER — Notice — Recital in Deed.**—Where a grantee assumes payment of notes executed by his grantor for the price of the land, a recital in the deed under which the grantor acquired title, that such notes are secured by a deed of trust, a notice to the grantee of the existence and terms of the trust deed. — *CHRISTIAN v. HUGHES*, Tex., 36 S. W. Rep. 298.

121. **WATER RIGHTS AND WATER COMPANIES—Foreign Corporations.**—A foreign corporation, coming into California, and acquiring water and water rights under the provisions of the State constitution (Const. 1879, art. 14, § 1), which declares that the use of water appropriated for sale, rent, or distribution is a public use, subject to regulation and control by the State, and that the rates of compensation for such use shall be fixed annually by cities, counties, and towns, will not be heard to assert that the constitution and laws under which it has acquired such rights are in contravention of the constitution of the United States. Such corporation may, however, question the reasonableness of the rates established by any municipality. — *SAN DIEGO LAND & TOWN CO. v. CITY OF NATIONAL CITY*, U. S. C. C. (Cal.), 74 Fed. Rep. 79.

122. **WILL—Contingent Devise.**—A provision in a will making a devise dependent on the death of another beneficiary without issue must be construed to take effect only in the contingency of the death of such beneficiary without issue during the life of the testator. — *ANTIOCH COLLEGE OF YELLOW SPRINGS, OHIO, v. BRANSON*, Ind., 44 N. E. Rep. 314.

123. **WILLS—Revocation.**—Under Rev. Civ. Code, art. 1691, which provides that there shall be an express revocation of a testament "when the testator has formally declared, in writing, that he revokes his testament," a testator may revoke all prior wills without making a new will containing an express affirmative, new disposition of his property. — *SUCCESSION OF SMOUR*, La., 20 South. Rep. 217.

124. **WILLS — Charging Legacies.**—A testator may charge a certain portion of his estate with legacies, provided he leaves sufficient besides to pay his debts. — *WEBSTER v. WIGGIN*, R. I., 34 Atl. Rep. 990.

125. **WILLS—Precatory Trust.**—Testator, who was a skilled lawyer, and who drew his own will, after giving life estates and estates in remainder by apt technical words, gave the residue of his estate, real and personal, in fee, to his daughters, and requested his executors, in apportioning such residue, to require of his daughters that their respective daughters should receive of his estate, severally, about double the amount that his daughters' sons should receive: Held, that the daughters of testator took an absolute fee simple in the residue; the expression of testator of his desire in regard to the distribution by the daughters of his bounty being insufficient to create, in favor of their children, a trust, or to create an executory devise in their favor, or to cut down the fee theretofore given to a life estate. — *IN RE BELLAS' ESTATE*, Penn., 34 Atl. Rep. 100.

126. **WITNESS — Husband and Wife.**—Where a husband, in furtherance of the fraud of others, prevails upon his wife to sign a note and incumber her property, equity will, in the absence of other evidence, in order to expose the fraud in all its details, permit both husband and wife to testify as to the conversations had between them in regard to the transaction. — *MOECKEL v. HEIM*, Mo., 36 S. W. Rep. 226.